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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

No. 213.

FEDERAL TRADE COMMISSION,
Petitioner.

vs.

SINCLAIR REFINING COMPANY, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, SINCLAIR REFINING COMPANY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 213.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

SINCLAIR REFINING COMPANY, a Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT, SINCLAIR REFINING COMPANY.

STATEMENT OF CASE.

The respondent, Sinclair Refining Company, is a Maine corporation, with its principal business office in Chicago, Illinois. It is engaged in refining crude petroleum and in buying and selling crude petroleum and its refined products.

This cause places in issue respondent's methods in leasing and loaning oil pumps, storage tanks or containers, and their equipments to various persons, firms, copartnerships and corporations.

In this brief all citations to the record refer to the printed record in the Sinclair case.

The Federal Trade Commission issued its order quiring the respondent to cease and desist from its me ods of leasing and loaning the devices referred to.

On the petition of respondent the United States C cuit Court of Appeals for the Seventh Circuit review the order to cease and desist entered against respond by the Federal Trade Commission, and on considerati thereof entered its decree annulling and setting asi said order.

The cause is now before this Court by certiorari.

It is believed the following excerpts from and co ments upon the record will prove convenient to the Co in its consideration of this cause:

THE COMPLAINT.

July 18, 1919, the Federal Trade Commission issu its complaint (Sinclair Record, pp. 32-35, both inclusive charging that respondent, in interstate commerce, f more than four years last past has been engaged in th business of purchasing and selling refined oil and gas line (referred to as products), and the leasing and loa ing of oil pumps, storage tanks or containers and the equipments (referred to as devices), in competition wi numerous persons, firms, copartnerships and corpora tions similarly engaged, and in so doing—

COUNT I. In violation of the provisions of Section of the Act of Congress, approved September 26, 191 known as the Federal Trade Commission Act, (38 Sta at L. 717), has been using unfair methods of compet tion:

(a) With the effect of stifling and suppressing com petition in the sale of products and in the sal leasing or loaning of devices;

(b) With the effect of injuring competitors.

(c) In selling, leasing or loaning devices for prices or considerations which do not represent reasonable returns on the investments therein.

(d) In selling, leasing or loaning devices at prices below the cost of producing and vending the same.

(e) In providing in contracts covering the leasing or loaning of devices that the lessee or borrower shall not place in such devices or use in connection therewith products of a competitor of respondent.

(f) With the resultant loss of numerous customers and prospective customers by competitors of respondent.

COUNT II. In violation of the provisions of Section 3 of the Act of Congress approved October 15, 1914, known as the Clayton Anti-Trust Act, (38 Stat. at L. 730), has been using unfair methods of competition:

In leasing devices at a fixed price charged therefor on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent, with the effect to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative.

THE ANSWER.

The answer of respondent to the complaint of the Commission contained (Sinclair Record, pp. 36-42, both inclusive):

AS TO COUNT I.

(a) A general denial.

(b) An admission of its corporate existence and that it is engaged in the business of purchasing and selling refined oil and gasoline, as well as the general refining of oils and the marketing of refinery products; that it is engaged in the

leasing and loaning of devices, and that the considerations received therefor do not in all instances represent reasonable returns upon the investment in such devices when the business of leasing or loaning such devices and the returns received thereon are considered separately and apart from the general business and sales policy of respondent.

(c) An averment that respondent has no knowledge of the cost to the manufacturer of producing and vending these devices.

(d) A specific denial that respondent's practice and custom of leasing and loaning devices have the effect of stifling and suppressing competition or of injuring competitors who sell said products and devices.

(e) An admission that respondent's form of contract with users of such devices provides in substance that the same shall be used by the lessees for the sole purpose of storing and handling products supplied by respondent, and setting forth a copy of the form of said contract (Sinclair Record, pp. 37 and 38).

(f) Specific denials that respondent has the knowledge, charged in the complaint, of the status and methods of certain dealers and certain of its competitors.

(g) Specific denial that respondent has knowledge that numerous, or any, competitors who are unable to enter into lease agreements or understandings have lost numerous, or any, customers in the sale of products because of the business practice of respondent, whether such competitors sell devices or products, or both.

As to Count II.

(a) A general denial.

(b) A specific denial that the prices charged the users of such devices are fixed on the condition, agreement or understanding that such users shall not purchase or deal in the products of

competitor or competitors of respondent; or that such prices have any relation to the use to which such devices shall be put; or that the effect of respondent's contracts is substantially to lessen competition or to create a monopoly.

(c) An averment that under respondent's contracts the users of its devices are at liberty to deal in any of the products of respondent's competitors.

The answer then set forth "Grounds of Defense" alleging in substance that the methods and practice of respondent were not originated by it; that the same are proper, and are necessary to meet competitive conditions; that they protect the respondent in marketing its products and its customers in receiving the same, and serve to identify respondent's products, which are manufactured by it by means of expensive processes and methods.

HEARING.

On September 26, 27 and 29, 1919, in its offices in Washington, D. C., testimony was heard simultaneously and in one proceeding before the Commission in support of the complaint against respondent and five other respondents; but the cases were not consolidated (Sinclair Record, pp. 44-134, both inclusive). Respondent offered no testimony, but entered into a written stipulation with the Commission covering certain features of the case (Sinclair Record, pp. 135-138, both inclusive).

COMMISSION'S REPORT, FINDINGS AND CONCLUSIONS.

October 14, 1919, the Commission issued its Repor Findings and Conclusions in substance as follows (Si clair Record, pp. 139-143, both inclusive):

1. That your respondent is a Maine corporation, no and since January 25, 1917, engaged in the business refining, purchasing and selling products as hereinbefor defined, and engaged in the leasing and loaning, but no in the manufacture, of devices as hereinbefore define in various states of the United States, but not in the Dis trict of Columbia, in competition with numerous othe persons, firms, corporations and copartnerships similarl engaged.

2. That in the conduct of its business as aforesaid purchases devices, and leases and loans the same to vari ous persons, firms, corporations and copartnerships, an in so doing said products and devices are handled an transported in interstate commerce by respondent and its competitors.

3. That in leasing and loaning said devices the con siderations received are less than the cost of purchasing and vending the same, when the business of leasing o loaning and the returns received therefrom are consid ered separate and apart from the general business and sales policy of respondent; and that the form of contract provides, in substance, that said devices shall be used for the sole purpose of storing and handling the products of respondent.

4. That a small proportion of such lessees handle sim ilar products of respondent's competitors and in so doing do not require or use more than a single pump outfit; that the practice of leasing such devices requires a large

capital investment; that many of respondent's competitors do not possess sufficient capital and are not able to purchase and lease devices as respondent does, partially by reason of which competitors have lost numerous customers to the respondent; and that the effect of the practice may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products.

The Commission therefore concludes that the methods of competition and the business practices set forth in its findings are unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Anti-Trust Act.

ORDER TO CEASE AND DESIST.

On October 14, 1919, the Commission followed its Report, Findings and Conclusions with an order directed to respondent to cease and desist, which is in substance as follows (Sinclair Record, pp. 143-145, both inclusive):

1. To cease and desist from directly or indirectly leasing pumps or tanks, or both, and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice prohibited.

2. To cease and desist from entering into contracts or agreements with dealers of respondent's petroleum products or from continuing to operate under any con-

tract or agreement already entered into conditioned that the devices leased to them thereunder shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect.

3. Provision is made that as to such devices as are now leased contrary to the order, the respondent shall have four months from the date of the order to enter into new contracts not incompatible with the spirit and intent of the order.

4. Under the provisions of paragraph (b) of Section 6 of the Federal Trade Commission Act the respondent is ordered within twenty days after the expiration of the four months' period above mentioned to make written report to the Commission of the plan or plans adopted for the lease, loan, gift or sale of devices and submit therewith forms of contracts proposed to be used.

BRIEF OF ARGUMENT.

INTRODUCTORY STATEMENT.

Preliminary to the argument in chief, a brief explanation of the nature and character of gasoline and kerosene, of the methods of storing and marketing the same, and of the equipment and devices used therein may be appropriate and prove helpful.

Gasoline is highly volatile and inflammable. Kerosene is inflammable and some dangers are connected with its storing and handling. Many of the states of the United States have imposed rigid inspection laws covering the manufacture, transportation and sale of both commodities; and practically all cities and towns have enacted strict provisions for the storing, handling and dispensing of the same.

When marketing of these products began they were transported and delivered in wood barrels in which the retailer inserted faucets with which to draw off the liquid into open measures, buckets or tin containers. This method of handling proved unsatisfactory for many reasons, among them being the attendant danger from fire, the deterioration of the commodity from its exposure to the atmosphere, and the consequent waste and spillage. These containers and appliances were furnished to the local dealer by the refiner or marketer.

Confronted on the one hand by statutory regulations and safeguards, and on the other by economic waste and loss, the marketer sought devices that would meet both situations. There came into use a form of metal tank of considerable capacity with hand pump, self measuring or

otherwise, for the storage and dispensing of kerosene. In practically all instances these are furnished by the local dealer. The adoption of gasoline as motive power for engines marked the beginning of its highest and fullest use thus far. It also made necessary the storing of this product in large quantities at points convenient to the public, and such storage and dispensing made it imperative that the same be safe, lawful and free from waste. Out of these conditions and necessities there developed the steel tank or container for the storage of gasoline, usually placed underground, and the selfmeasuring pump for dispensing the commodity through hose or metal pipes direct to the receptacle into which it is delivered. This equipment is practically air-tight and serves to prevent waste of the commodity and communication of fire thereto. The capacity of the tank employed depends usually on the extent of the business of the local dealer, ranging in size from 250 gallons to 1000 gallons, with 550 gallons as a fair average. The pumps used are either one-gallon or five-gallon capacity: that is, having a delivery capacity of one or five gallons at the time. The cost of a pump and tank, including installation, ranges from $150 to $500 with $300 as a fair average. It has become nearly a universal practice for refiners and marketers to lease and loan to local dealers such tanks and pumps for the storage and dispensing of gasoline. This practice, with its attendant conditions, is the basis of the Commission's complaint.

This storage and dispensing equipment, hereinbefore referred to as devices, is usually installed at the curbline or roadside for the convenient delivery of gasoline to the public, particularly to owners of automobiles and tractors. The installation may be in connection with a place of business or residence. Frequently the business house is a garage, but very often is a grocery store or

other business place having a convenient and desirable location.

It is the practice of refiners and marketers to establish at central points in territory to be supplied by them storage stations of sufficient capacity in which to store gasoline and kerosene in quantities adequate to supply such territory. From such storage stations deliveries are made by tank trucks, either motor driven or horse drawn, owned and maintained by the refiner or marketer. It is of course to the economic advantage of the marketer or refiner to make such deliveries in as large quantities and in as few trips as possible. It serves this purpose if the refiner or marketer has an established trade and thus knows with reasonable certainty the probable gallonage it will be called upon to supply. Usually the local dealer trades with that refiner or marketer whose commodity and service prove satisfactory to the trade of the dealer. A market and trade are established similar to those in other lines of merchandising.

From the foregoing it is apparent that one may have a convenient and desirable location for the installation of gasoline storage and dispensing devices; but on account of the required investment in equipment such one may hesitate to become a dealer in gasoline. Should a refiner or marketer lease or loan to the owner of such site devices at a nominal consideration, conditioned that products other than those of the lessor shall not be stored in or dispensed from such equipment, the lessor would thus have an additional station for the distribution of its products and a new competitive factor would be introduced into the general marketing field; the lessee would be established in a business enterprise, and there would be provided additional service and facilities for the handling and marketing of gasoline with safety and convenience to the public.

This method of storing and dispensing gasoline has resulted in marked increase in the number of tanks and pumps used. It has furnished the manufacturer of such devices a market not theretofore enjoyed by him. Your respondent is not engaged in the manufacture of such devices; but purchases the same in large quantities from manufacturers. It would seem, from the viewpoint of manufacturers of devices, that this wholesale market should be preferable to retail selling to widely scattered local dealers.

This method of storing and dispensing gasoline makes for the safety and great convenience of the public. In the territory under consideration there is hardly a community or a developed line of travel that is not supplied with a filling or service station at which gasoline may be obtained.

Your respondent attaches especial value and importance to its refining methods and processes, and to the quality of kerosene and gasoline produced thereby. These commodities it sells under trade marks and trade names, believing them to have superior qualities for the purposes for which they are manufactured. Stress is laid on these features in its advertising and sales campaigns. It believes that a large portion of the trade has found respondent's products satisfactory and prefers the same to others. It seeks to provide assurance that those calling for its products will receive the same. Obviously, trade marks and trade names cannot be attached to or placed on such products, but can be placed upon containers and pumps used in the sale thereof. Frequently this is done by means of a suitable sign, usually lighted by electricity, attached to the equipment. A further safeguard adopted by the respondent is to incorporate in its rental contracts covering devices a condition that the dealer shall not store therein or dispense therefrom any product other

than that of the respondent. This method reasonably assures the trade that the products it receives through devices so loaned and marked are the products of respondent. Such restrictive clause does not prevent the dealer from leasing devices or from purchasing and dispensing the products of refiners and marketers other than the respondent; but it does establish a safeguard against dispensing through the respondent's equipment products inferior to or other than those of the respondent.

Explosions and fires, with resultant damage to persons and property, frequently follow improper storage or handling of gasoline, or the use of inferior products. To lessen its liability from such disasters it behooves the refiner or marketer to provide safe devices for the proper handling of its products in the course of marketing them, and so far as may be to provide against inferior products being marketed from those devices. A means to these ends is respondent's practice of leasing to its customers proper tanks and pumps on the condition there shall not be stored therein or dispensed therefrom products other than those furnished by the lessor.

With many of the larger refining and marketing companies it is the practice to erect "drive-in" service or filling stations. The difference between this type of station and the one above referred to is that the drive-in station is designed and used exclusively for the marketing of gasoline and petroleum products, while the other type, generally referred to as a "curb" station, consists merely of a pump and tank operated in connection with some other business. The drive-in station is provided with a building used as the office of the attendant and for storing and displaying lubricating oils, greases and such other commodities as are on sale. The pump or pumps are so located in a drive-way, leading from and to the street, as to enable customers to drive in with their cars and get their supply of gasoline and drive out with

the least inconvenience. This type of station is som
what elaborate in design and of rather expensive c
struction and involves considerably more outlay th
does the curb station. The drive-in station is growi
in popularity with the public and, regardless of this it
of expense, is being installed by many of the larger
fining and marketing companies. This situation prese
a new and additional competitive factor which the smal
company is called upon to meet. Competition involvi
the leasing and loaning of devices is less onerous th
that wherein the drive-in station is involved.

REVIEW OF EVIDENCE.

Respondent respectfully submits that the Commissio
findings of fact and conclusions are not supported
the evidence, and that a review thereof will so disclo
The record in this respondent's case, coming from t
Seventh Circuit, stands alone so far as this respondent
concerned, and there is no agreement between counsel f
the petitioner and this respondent that the record
any similar case applies to this respondent's case.

Respondent has made the following review or digest
the evidence, (1) to substantiate its assertion that t
Commission's findings and conclusions are not support
by the evidence, and (2) if possible, to assist the Cou
in its inquiry whether the evidence supports the Co
mission's findings of fact, it having been held: "Ma
festly, the court must inquire whether the Commission
findings of fact are supported by the evidence. If so su
ported, they are conclusive."

Federal Trade Commission v. *Curtis Publishi*
Company, ... U. S. ...., decided January
1923.

Federal Trade Commission v. *Gratz*, 253 U. S
421, 424.

In considering the evidence offered on behalf of the Commission, the respondent is confronted with a situation out of the ordinary.

On September 26, 27 and 29, 1919, in its offices in Washington, D. C., testimony was heard simultaneously and in one proceeding by the Commission in support of the complaint against respondent and five other respondents. There were six separate and distinct cases; but they were not consolidated. It becomes difficult to determine what portions of the evidence apply only to the respondent, and what apply only to the respondents in the other five separate and distinct cases; and what portions of the evidence apply to all of the several respondents.

Before the Commission convened to hear these cases attorneys for respondent and for the Commission entered into a stipulation as to certain facts (Sinclair Record, pp. 135 to 138, both inclusive).

At the beginning of the hearing and before any testimony was heard, but after the Commission had convened, inquiry was made by Commissioner Colver and answered by Mr. Chester L. Zechiel, attorney-examiner for the Commission, as follows (Sinclair Record, p. 45):

> "Commissioner Colver: We understand that these cases are not consolidated except that they are being heard simultaneously; that each case is being considered separately and there is not in fact a consolidation.
>
> Mr. Zechiel: That is correct, sir, as I understand it."

Aside from the stipulation entered into between the Commission and respondent, the Commission introduced evidence only on the economic question so called. This is clearly disclosed by the record; and in reviewing the evidence of the witnesses who testified on behalf of the Commission, the respondent has assumed that it may

fairly rely upon the record that the evidence of such witnesses goes only to this one question:

> "The Acting Chairman: Here is the agreed statement of fact with the Sinclair Company, but you say it is not complete.
>
> Mr. Zechiel: The agreed statement is complete. It covers all the evidence except the economic question." (Sinclair Record, p. 77.)

There are further announcements appearing in the record that the economic question is the only one upon which the Commission produced its witnesses. These may be found Sinclair Record, pp. 45, 47 and 84.

With this situation in mind respondent has made three classifications of the Commission's evidence, aside from the stipulation, as follows:

(a) That which specifically refers to respondent.

(b) That which refers to a practice not indulged in by respondent.

(c) That which is general in its relation to the practice of respondent.

Thirteen witnesses were called on behalf of the Commission. Twelve of them represented oil companies; and one, Robert S. Colwell, is assistant general sales manager of S. F. Bowser Company, Fort Wayne, Indiana, engaged in the manufacture and sale of oil pumps and tanks. The home offices or headquarters of the oil companies represented by the government's witnesses are located in eight states as follows: Illinois, Ohio, Iowa, Wisconsin, Minnesota, Missouri, Kansas and Oklahoma. Charles L. Smith and W. E. Williams, two of such witnesses, are connected respectively with C. L. Smith Company and Iowa Oil Company, respondents other than your respondent. The commercial activities of the several respondents cover 37 states as follows: Alabama, Arkansas, Colorado, Connecticut, Deleware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Mary-

land, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

The evidence, (aside from the stipulation) on behalf of the Commission, which specifically refers to respondent.

Only seven of the Commission's witnesses testified directly about respondent. The testimony of four of them (W. L. Zust, W. E. MacEwen, H. F. Bagby and L. B. Hancock) in this respect is merely that respondent is one of their competitors; while that of a fifth witness, H. E. Wormhoudt, is merely to the effect that his company does not have respondent as one of its competitors. A sixth witness, Robert S. Colwell, testifies in relation to respondent that his company had manufactured for and sold to respondent certain pumps, the style and design of which the witness describes. The remaining witness, Joseph F. Kunz, states that respondent is a competitor of his company, and in one instance respondent furnished a customer a pump and sold the customer gasoline on a commission basis of one cent a gallon. The witness does not pretend to testify as to the nature or conditions of the contract between respondent and such customer with relation to the pump in question.

The following is an abstract of the testimony of the seven witnesses referred to:

W. L. Zust, whose testimony appears Sinclair Record, pp. 57 to 63, both inclusive, testified that he is manager of the Interstate Oil Company at La Crosse, Wisconsin. This witness testified as follows with relation to respondent:

"Q. (By Mr. Zechiel, Attorney for the Commission): Does the Sinclair Company sell in your community?

A. They do part of it. They have a station at Minneapolis and we come in competition with them up close to Minneapolis." (Sinclair Record, p. 58.)

H. E. WORMHOUDT, whose testimony appears Sinclair Record pp. 63 to 70, both inclusive, testified that he is Manager of the Manhattan Oil Company at Des Moines, Iowa. The witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Is the Sinclair Oil Company in your territory?

A. Not directly. We do not have the Sinclair at any of our stations, although they are generally in the State of Iowa." (Sinclair Record p. 67.)

W. E. MACEWEN, whose testimony appears Sinclair Record pp. 70 to 77, both inclusive, testified that he is Secretary and General Manager of the Nash (National) Refining Company at Cleveland, Ohio. This witness testified as follows with relation to respondent:

"Q. (By Mr. Zechiel, Attorney for the Commission): Who are your competitiors in your various territories?

A. Well, it really includes all the leading refiners and shippers of that particular product.

Q. And in connection with that, the Sinclair Refining Company?

A. Yes, sir." (Sinclair Record p. 71.)

"Q. (By Acting Chairman): What is the competition in Kentucky?

A. The Standard Oil Company of Kentucky is our principal competitor in Kentucky. Then there are a great many jobbers that operate out of Louisville—the Stoll Oil Company, and I do not know whether the Sinclair is in Kentucky or not." (Sinclair Record p. 71.)

JOSEPH F. KUNZ, whose testimony appears Sinclair Record pp. 78 to 83, both inclusive, testified that he is

Secretary of Kunz Oil Company, Minneapolis, Minnesota. This witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Do you know the names of any of the competing oil companies?

A. In our city the Sinclair and the Standard.

Q. (By Commissioner Thompson): Of Indiana?

A. Of Indiana; yes sir.

Q. (By the Acting Chairman): Your city is what?

A. Minneapolis." (Sinclair Record, p. 79.)

In response to questions as to whether witness' company had ever lost any customers by failure to furnish them devices, the witness answered that in some instances it had lost gasoline customers but continued to sell some of these customers lubricating oils. The witness was then asked to describe some such instances and did so; and his testimony then proceeded as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): What other instances of that sort have you in mind?

A. There is one of the 13th Avenue Hardware Company. They put in a pump of the Sinclair Company in the same way.

Q. What were the facts about that?

A. They wanted us to put in a pump and we would not do it, and the Sinclair Company put in a pump in their place and sell them gasoline under one cent a gallon commission, one cent a gallon profit.

Q. Are there any other instances that you recall?

A. No, I do not.

Q. That is the Sinclair Refining Company to which you refer?

A. Yes, sir, the Sinclair Refining Company." (Sinclair Record, p. 81.)

Robt. S. Colwell, whose testimony appears Sinclair Record, pp. 94 to 98, both inclusive, testified that he is assistant general sales manager of S. F. Bowser Com-

pany, of Fort Wayne, Indiana, engaged in the manufac
ture and sale of oil pumps and tanks. This witness tes
tified with relation to respondent as follows:

"Q. (By the Acting Chairman): I would like t
ask this question as a trade matter:

In manufacturing pumps do you manufacture them
always for Bowser, or will you manufacture for other
sellers of gasoline if they desire? Suppose the Sin
clair Oil Company came to you and wanted pumps
Would you manufacture them for the Sinclair O
Company?

A. Our business, you know, is only the equipmen
We do not sell any gasoline or oil.

Q. I know that is true.

A. But we do business with the Sinclair people

Q. And do manufacture for them?

A. Only under our own name.

Q. That is what I wanted to know.

A. No; we never manufacture with any label b
the Bowser label.

Q. You manufacture a pump for the Sinclair Com
pany as a Bowser pump but carrying above the pum
this Sinclair sign?

A. We have done that. We do that right along—
finish it in what we call, in that case, the Sinclai
finish.

Q. You are just interested in the sale of pumps?

A. Yes, sir.

Q. (By Mr. Zechiel, Attorney for the Commis
sion): When you say you finish it in the Sinclai
finish, just exactly what does that mean?

A. That means, in their case, a green pump with
white top, and some—

Q. That portion above the ground?

A. Yes, sir. The pedestal would be green—I think
that is their trade mark color—and the top part is
white, which is another one of their colors, and gol
striping, and then the Sinclair trade mark name o
there.

Q. (By the Acting Chairman): On the lamp? I
think I have seen that.

A. I do not think the Sinclair people use a lamp
Some of the other companies do." (Sinclair Rec
ord, pp. 97-98.)

H. F. Bagby, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, testified that he is connected with the White Eagle Oil Refining Company, of Wichita, Kansas. This witness testified with relation to respondent as follows:

"Q. (By Mr. Zechiel, Attorney for the Commission): Who are your competitors in that territory (States of Kansas and Colorado)?

A. Standard Oil Company of Indiana, mostly.

Q. Does the Sinclair Company sell there?

A. They are a competitor, too.

* * * * *

Q. What are the other competitors besides the Standard?

A. The Sinclair is the next largest, and then there are several small companies." (Sinclair Record, p. 109.)

L. B. Hancock, whose testimony appears Sinclair Record, pp. 120 to 125, both inclusive, testified that he is manager of the Pure Oil Company, Minneapolis, Minnesota. This witness testified with relation to respondent as follows:

"Q. Is the Sinclair Company one of your competitors?

A. Yes, sir." (Sinclair Record, p. 121.)

The evidence, (aside from the stipulation) on behalf of the Commission, which relates to a practice not indulged in by respondent.

In its complaint the Commission charges the respondent with leasing or loaning devices on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent (Sinclair Record, p. 35); but the Commission found and the evidence discloses that the condition incorporated by respondent in such contracts is that such devices shall be used by the lessee only for the

purpose of holding and storing the respondent's petro-
lem products. (Sinclair Record, pp. 136 and 142.) The
condition charged and the condition proven and found are
vastly different: the former prohibits the lessee from
dealing in, buying or selling the products of a competitor
of the lessor; while the latter merely restricts the lessee
in the commodity stored in and dispensed through the
lessor's devices, and in no way restricts the lessee in buy-
ing and selling the products of a competitor of the lessor.
Respondent assumes therefore that if a witness for the
Commission testified as to a practice or form of contract
based on the condition that the lessee thereunder shall
not purchase or deal in the products of a competitor or
competitors of the lessor, the witness would be testifying
to a condition and state of facts not applicable to respond-
ent; and that therefore the testimony of such witness
and his deductions and conclusions therefrom as to the
effect of the practice should be disregarded so far as the
respondent is concerned.

The six Commission witnesses whose testimony is of
this character are Charles L. Smith, W. L. Zust, H. F.
Wormhoudt, W. E. MacEwen, O. L. Cordell and W. F.
Williams, of whose testimony respondent has made the
following abstract:

CHARLES L. SMITH, whose testimony appears in Sin-
clair Record, pp. 48 to 57, both inclusive:

"Q. Does the contract provide that the companies
or the customers to whom you may loan or lease
these pumps and tanks are not to use any gasoline
of any other competitor at all?

A. Absolutely." (Sinclair Record, p. 50.)

"Q. But you have made contracts with these var-
ious garages?

A. Oh, yes, sir, the same as we make on lubricat-
ing oil, to protect them a certain period of time."

"Q. Do I understand that by the terms of these
contracts they are not permitted to buy such prod-

ucts as are included in the terms of the contracts from competitors of yours?

A. Absolutely so." (Sinclair Record, p. 54.)

W. L. Zust, whose testimony appears in Sinclair Record, pp. 57 to 63, both inclusive:

"Q. Do you lease or loan oil tanks and pumps under contracts whereby you require your lessee to use only your own products and pay only a nominal consideration for the pumps and tanks?

A. No, sir." (Sinclair Record, p. 59.)

"Q. Describe your experience in this respect.

A. A year ago or some such a matter the Standard Oil Company of Indiana allowed their customers to have these tanks. They were leased or given away; I do not know just exactly what the arrangement was.

Q. You say you don't know what the arrangement was? You do know that they leased these pumps for a nominal consideration?

A. I don't know whether they got anything or not. I doubt whether they got anything." (Sinclair Record, p. 59.)

H. E. Wormhoudt, whose testimony appears in Sinclair Record, pp. 63 to 70, both inclusive:

"Q. What was the effect of the agreement?

A. That we would furnish without charge this pump, and that so long as the pump was used our goods should be used, should be purchased by this man to whom we had loaned the pump. But I might say that we were jockeyed into that proposition. We did not do that willfully.

Q. What do you mean by that?

A. I mean that competitors had made an offer to do that or to take from us that customer's business." (Sinclair Record, p. 65.)

W. E. MacEwen, whose testimony appears in Sinclair Record, pp. 70 to 77, both inclusive:

"Q. Does it ever occur to you that the situation now differs materially from the old times when trade was small, units were small? In your boyhood

it was quite common for a merchant to give something 'to boot'? It was in the shape of a gratuity. Giving a pump is something more as I see it from what I have heard today, than giving something 'to boot,' is it not?

A. Yes, sir; because you surround that with an ironclad agreement to compel that customer to buy your goods during the time he has that pump in there, whether the quality of the gas deteriorates or not. He is under that obligation to use your goods exclusively. You immediately affect the entire petroleum industry under that kind of contract." (Sinclair Record, p. 73.)

"Q. Can you add anything to what has been said here today about the fact that the sale of the gasoline with the gift of the pump or the lease of the pump at a nominal figure is used as a device for the sale of lubricating oil?

A. I think that is true to a considerable extent. The object in giving the pump is to find a market for the gasoline, a method by which to distribute the gasoline. Of course, the contract carries with it a clause that they shall use all of their petroleum products in return for giving that pump and tank. I do not believe you can give a pump and tank and make any money out of gasoline." (Sinclair Record, p. 74.)

O. L. Cordell, whose testimony appears in Sinclair Record, pp. 85-94, both inclusive:

"Q. What was the consideration, if any, that was given for the use of these tanks and their equipment?

A. None whatever. The business——

Q. Nothing but the agreement to use in connection with these particular pumps and tanks your own gasoline products?

A. Yes, sir.

Q. In that connection did you also require the customers to purchase lubricating oils through your company?

A. That was not a consideration. However, it was generally understood that we should have their lubricating oil business.

Q. Was it understood between you and your customer that they were to buy all of their gasoline from your company?

A. It was." (Sinclair Record, p. 88.)

W. E. WILLIAMS, whose testimony appears in Sinclair Record, pp. 113 to 120, both inclusive:

This witness testified that his company had changed its form of contract and inserted therein a clause to the effect that the lessee might have the privilege of installing devices of like nature of another oil company for the purpose of handling such other company's oils if so desired. Directing the witness's testimony to the former contract used by his company and in answer to an inquiry, he stated as follows:

"A. Yes, sir. The original agreement stated that we were to have the exclusive sale of the gasoline during the life of the contract." (Sinclair Record, p. 116.)

The testimony of this witness is based entirely on a condition brought about by contracts of the nature described in the above portion of his testimony.

The evidence, (aside from the stipulation) on behalf of the Commission, which may be regarded as having general application to the practice charged against respondent.

If the testimony of the six witnesses last above mentioned is eliminated from consideration in respondent's case, there would remain seven witnesses on behalf of the Commission.

We now proceed to a review of the evidence of those witnesses on behalf of the Commission whose testimony may be regarded as applicable to a practice or plan of leasing or loaning devices in the manner and on the condi-

tions devices are leased or loaned by respondent. This evidence is general in its application, and almost without exception does not specifically relate to the respondent's case. In considering this evidence it may be advisable to again state that respondent's leasing or loaning contracts are conditioned that the devices covered thereby shall be used by the lessees only for the purpose of holding and storing the respondent's petroleum products, and do not restrict the lessee from dealing in or selling products of competitors of respondent.

Of the remaining seven witnesses ROBERT S. COLWELL (Sinclair Record, pp. 94 to 98, both inclusive) is assistant sales manager for S. F. Bowser Company, engaged in the manufacture and sale of oil pumps and tanks (Sinclair Record, p. 94); and his testimony goes only to the question of the jurisdiction of the Commission as shown by the record:

> "The Acting Chairman: What do you expect to show by this witness?
>
> Mr. Zechiel: Jurisdiction only, Mr. Murdock.
>
> The Acting Chairman: He does not know anything about the economic situation at all.
>
> Mr. Zechiel: And nobody from Bowser's headquarters knows. The only way I could get that evidence would be to call one hundred twenty-four agents. I would have to call those agents particularly to get that evidence. I think we have probably got it through the oil company witnesses." (Sinclair Record, p. 97.)

The following is an abstract of the testimony of the Commission's six remaining witnesses in its relation to a contract apparently containing the condition incorporated in respondent's contract:

JOSEPH F. KUNZ, a Commission witness, whose testimony appears Sinclair Record, pp. 78 to 84, both inclusive, testifies in substance as follows:

His company does not deal in pumps and tanks, but is engaged principally in the sale of lubricating oils, although it handles gasoline and kerosene, which it sells to truck owners. It has no filling stations. It is his belief that his company is not selling gasoline to garage people for the reason that it declines to lease or loan devices to garages, at least it is his opinion that has considerable to do with it. (Sinclair Record, pp. 78 to 79.)

When asked to explain the whole situation the witness in substance stated: We have lost one customer, The Peter Faber Co. We sold them. They asked us to furnish them a pump and tank, which of course we could not afford to do, and would not do, so they bought from some other company. I am not in position to say whether this other company put in a pump because I do not know. This is only what the customers tell us, that they agreed to put in a pump and tank. They have not bought any gasoline from us since the installation of the pump. We called on them, but they never bought any more from us since then. The customer felt on account of using their pump and tank it was not policy for him to buy his gasoline from us. We tried to and did sell him lubricants. He buys lubricating oil from us. In the case of the East Side Auto Company it was represented that other companies were going to furnish them oil and to furnish a tank. In order to keep the customer we had to pay for one-half of the tank and the pump. (Sinclair Record, pp. 80 to 81.)

The witness states that he does not know of an instance where this company was deprived of the sale of lubricating oils to a customer by reason of a competitor installing oil pumps; and that in his case it does not follow that because a dealer uses a loaned pump the dealer thereby ties himself up to buy his lubricating oil of the one who sells him the gasoline; that in a great many cases it does

not make any difference, as the dealer will probbly bu
the gasoline from the company loaning the pump and bu
lubricating oil from the witness' company. (Sinclair Re
ord, p. 82.)

"Q. (By Commissioner Thompson): You thi
it cuts down competition in gasoline?

A. By owning your own tank?

Q. No; by having a tank which simply is give
you for a nominal sum?

A. Yes, sir.

Q. (By the Acting Chairman): I wish you woul
explain why it cuts down competition?

A. For this reason, just as I explained before.
am not in position to sell a man gasoline if he comes
me and says, 'Here, I am buying my gasoline fro
you and have to furnish me a tank and a pump
We have not got the money to keep these tanks an
pumps, and it simply takes our business away fro
us; whereas, if that man buys his own outfit he com
come to me anyway and say, 'I want to buy som
gasoline from you,' and it would be all right. But
the other hand, we cannot sell them any gasoline.
do not mean to say we cannot sell them anything el

Q. Then, taking that answer that you have ju
made with the former answer a few minutes ago, th
device of the free pump in your opinion tends to r
duce the number of competitors to only the stronge
companies in the field, those who are enabled by re
son of their capital to give the pump. Is that tru

A. Yes, sir.

Q. So, while it reduces the number of competitor
can it be said that it actually reduces competition
more than one man is given the pumps?

A. Yes, sir." (Sinclair Record, p. 83.)

Seth C. Drake, a Commission witness, whose testimon
appears Sinclair Record, pp. 100 to 108, both inclusiv
testifies in substance as follows:

That in his experience numerous garages and retaile
use devices of more than one oil company and buy an
sell gasoline and oils of different companies at the sam
time. (Sinclair Record, p. 103.) But in most cases the

have only one pump, and that will be loaned by somebody, and of course there would not be anybody else's gas handled as a rule, but in many cases they do have two tanks and pumps and handle two different kinds of gasoline, and have the gasoline of more than one competitor go through the pump. Many garages buy gasoline of two or three different companies. They buy from us one week, of some other company next week, and another company the week after. In many cases they buy of us exclusively. We do not restrict them from putting in someone else's pump and tank. (Sinclair Record, p. 104.)

H. F. Bagby, a Commission witness, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, gives the following testimony:

"Q. With what company are you connected?

A. White Eagle Oil Refining Company of Wichita.

Q. How long have you been connected with that company?

A. Ever since its organization, July, this year." (Sinclair Record, p. 108.)

"Q. Do you lease or loan oil tanks and pumps?

A. This company, since its organization in July, has not sold any tanks or pumps or leased any.

Q. Is it your intention not to continue this practice or to adopt this practice?" (Sinclair Record, p. 109.)

"A. Unless we are forced to it. We do not approve of the practice.

Q. Why do you not believe in the practice or approve of it?

A. It is not a profitable way of doing business, we do not think.

Q. Do you handle lubricating oils?

A. Yes, sir.

Q. In your experience in the past, would you say that there is more profit in the sale of lubricating oils than there is in the sale of gasoline?

A. Yes, sir." (Sinclair Record, p. 110.)

L. B. Hancock, a Commission witness, whose testimony appears Sinclair Record, pp. 120 to 125, both inclusive, gives the following testimony:

"Q. Does your company buy and sell or lease and loan oil tanks and pumps in connection with its business?

A. We buy and sell and lease a few.

Q. You say you lease a few. Do you mean you lease a few under tying contracts for a nominal consideration?

A. We have a few of that kind, four, to be exact." (Sinclair Record, p. 120.)

"Q. Have you ever refused to lease and loan pumps under these contracts for a nominal consideration, tying contracts, to customers who requested them?

A. Yes, we have." (Sinclair Record, p. 122.)

"Q. What was the result of your refusal to lease the pumps?

A. The party that will do it will get the business.

Q. You lost the business of that company?

A. Yes, sir.

Q. (By the Acting Chairman): What is your experience with the sale of lubricating oils in connection with gasoline in the way of margin of profit?

A. Oh, the margin of profit is considerably greater in the lubricating oils." (Sinclair Record, pp. 122 and 123.)

The witness was then asked whether during the last two years he felt there were too many pumps being put in and that the numbers used were multiplied beyond any reasonable needs of society, to which he replied there might be if the business remained constant, but with the ever increasing demand for gasoline there is not too much equipment for the distribution of it.

"Q. It is not necessary, therefore, to actually lease or loan a pump for a nominal consideration under a tying contract in order to designate whose gasoline is being sold from the pump?

A. I do not consider it so." (Sinclair Record, p. 124.)

J. M. Welch, a Commission witness, whose testimony appears Sinclair Record, pp. 125 to 132, both inclusive, testifies in substance as follows:

That his company does not lease or loan devices (Sinclair Record, p. 126); that it is the custom of the large dealers to have two or three sets of pumps and tanks loaned to them by as many different oil companies; that with small dealers such as grocery stores, blacksmith shops or little stores where the demand is limited, usually there is only one device installed; that the larger dealers will not tie themselves up exclusively with any oil company through the leasing or loaning of equipment, and if the demand is great enough such dealer would put in one or more pumps of several concerns all on the same basis; that under such circumstances the dealer would not store and dispense the commodity of one oil company through the equipment of another oil company. (Sinclair Record, p. 128.) The witness stated he considered it good merchandising for an oil company to loan a pump to a dealer at a nominal rental in consideration of the dealer selling the company's gasoline. (Sinclair Record, p. 129.)

The witness then stated in substance that he regarded the practice as good merchandising in the days it was in its bloom, in the days when it was universally followed; but that he now regards it as unprofitable on account of the filling stations. (Sinclair Record, p. 130.) Witness further stated that he does not regard the general practice as detrimental to the community. The practice made it safer to handle gasoline for the reason that the smaller dealers could not afford to buy equipment themselves and if some big oil company or companies would furnish the pump and make it safe to handle the gasoline that in the opinion of the witness the practice was a good thing. The average dealer in small towns and grocery stores and little garages could not furnish his own pump equip-

ment and make a profit in handling gasoline as the investment would be too great. (Sinclair Record, p. 130.) There were lots of pumps that were probably leased or given away to firms that could have afforded to buy them, but in a number of cases pumps were put in and gasoline handled by dealers who could not afford to buy the pump equipment outright. He also stated that his company had tried to sell gasoline to small dealers who had been furnished pumps and was unsuccessful in doing so, and that his company had lost some customers to marketers who furnished equipment or devices. (Sinclair Record, p. 131.)

H. C. Wurster, a Commission witness, whose testimony appears Sinclair Record, pp. 132 to 134, both inclusive, gives the following testimony:

"Q. Do you lease or loan such pumps to your customers?

A. No, sir.

Q. During the conduct of your business has your company ever lost any business because it refused to lease or loan pumps?" (Sinclair Record, pp. 132 to 133.)

"A. I would say we have.

Q. You refused to lease them or loan them?

A. Yes, sir.

Q. Did you lose such customers?

A. Yes. I would say not in all cases.

Q. In many cases?

A. In many cases; yes, sir.

Q. Do you believe it to be a good business practice to lease or loan pumps under a nominal consideration in tying contracts?

A. I do not think it is a good policy; no.

Q. (By the Acting Chairman): Why do you not consider it good merchandising?

A. The question comes up where you have to buy your business in that way, I do not think it is good salesmanship. It lets the bars down, and practically there is no limit as to how many pumps you put out. I might add to that that if there could any limit be

made as to garages doing a large volume of business in order to protect the independents or the smaller companies against filling stations, it would be all right; but it is hard to draw a line and consequently I think it is simply poor merchandising all the way through." (Sinclair Record, pp. 133 to 134.)

COMPETITION.

Many oil companies engaged in business and competition is keen and active.

The testimony of the Commission's witnesses discloses that in the territory in which the respondent and the companies of the witnesses transact business many oil companies are engaged in the sale of petroleum products and that competition is not only free but particularly active.

In this connection, respondent directs attention to the following testimony:

CHARLES L. SMITH, a witness for the Commission, whose testimony appears Sinclair Record, pp. 48 to 57, both inclusive, states he is President of the C. L. Smith Oil & Gasoline Company, with headquarters in St. Louis and transacting business in the State of Missouri, particularly in the City of St. Louis. The witness enumerates six companies as being in active competition with his company (Sinclair Record, pp. 48-49), and in that connection testified as follows:

"Q. (By Mr. Zechiel, attorney for the Commission): During the time you have had these contracts with these various customers, were these various oil companies whom you have enumerated earlier in your testimony actively in competition with you in the City of St. Louis?

A. With the exception of the Standard, they were, yes.

Q. You mean the Standard of what?

A. The Standard of Indiana." (Sinclair Record, p. 52.)

W. L. Zust, a witness for the Commission, whose testimony appears Sinclair Record, pp. 57 to 63, both inclusive, testifies that he is Manager of the Interstate Oil Company of La Crosse, Wisconsin, engaged in business in two-thirds of the State of Wisconsin and the southern border of Minnesota. This witness names seven companies as being in active competition with his company. (Sinclair Record, p. 58.)

H. E. Wormhoudt, a witness for the Commission, whose testimony appears Sinclair Record, pp. 63 to 70, both inclusive, testifies that he is Manager of the Manhattan Oil Company, of Des Moines, Iowa, engaged in business in the State of Iowa and the two northern tiers of counties of Missouri. This witness enumerates six companies as being in active competition with his company. (Sinclair Record, p. 67.)

W. E. MacEwen, a witness for the Commission, whose testimony appears Sinclair Record, pp. 70 to 77, both inclusive, testifies that he is Secretary and Manager of Nash (National) Refining Company. This witness states that his company operates in the States of Ohio, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Oklahoma, Arkansas, Mississippi and Kentucky, and its competitors are all the leading refiners and shippers of petroleum products, naming specifically thirteen companies. (Sinclair Record, pp. 70 to 72.) The witness states that in the territory in which his company operates competition is keen. (Sinclair Record, p. 76.)

Joseph F. Kunz, a witness for the Commission, whose testimony appears Sinclair Record, pp. 78 to 84, both inclusive, testifies that he is secretary of Kunz Oil Company and that his company operates in Minnesota, North Dakota, South Dakota and part of Montana. (Sinclair

Record, p. 78.) The witness names two competitors of his company in the City of Minneapolis, Minnesota. (Sinclair Record, p. 79.) In relation to competitive conditions the witness stated in substance that his company "has stiff competition." (Sinclair Record, p. 82.)

O. L. Cordell, a witness for the Commission, whose testimony appears Sinclair Record, pp. 85 to 94, both inclusive, testifies that he is connected with the Sloan-Cordell Oil Company, of Oklahoma City, Oklahoma, and that his company operates in the State of Oklahoma but principally in Oklahoma City, Oklahoma. (Sinclair Record, p. 85.) The witness enumerates twelve companies as being in active competition with his company. (Sinclair Record, pp. 88-89.) In testifying about competitive conditions, the witness ventured the assertion that in Oklahoma City there are about three times as many service stations as were needed; that they are in all parts of the city; and that one does not have to drive very far in any part of the city to find a gasoline station operated by some oil or gasoline company there. (Sinclair Record, p. 93.)

Seth C. Drake, a witness for the Commission, whose testimony appears Sinclair Record, pp. 100 to 108, both inclusive, testifies that he is general manager of the sales department of the Standard Oil Company of Indiana, and that his company operates in the States of Indiana, Michigan, Illinois, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota, Kansas and Missouri. (Sinclair Record, p. 101.) This witness testifies, in substance, that competition is particularly active in the territory of his company; that dealers in petroleum products buy from his company one week, of another company the next week, and another company the week after. (Sinclair Record, p. 104.)

H. F. Bagby, a witness for the Commission, whose testimony appears Sinclair Record, pp. 108 to 113, both inclusive, testifies that he is connected with White Eagle Oil Refining Company, of Wichita, Kansas, operating in Eastern Colorado and Western Kansas. (Sinclair Record, p. 108.) He names four competitors of his company but states there are several. (Sinclair Record, p. 109.) In substance this witness states that competition among the oil companies is active. (Sinclair Record, p. 112.)

L. B. Hancock, a witness for the Commission, whose testimony appears Sinclair Record, pp. 120 to 125, testifies he is manager of the Pure Oil Company, located at Minneapolis, Minnesota, and the territory of his company is the northwestern states: Minnesota, Wisconsin, South Dakota, North Dakota, Montana, Wyoming, Idaho and Washington. (Sinclair Record, p. 120.) The witness states that in the Cities of Minneapolis and St. Paul, Minnesota, his company has 15 competitors and as many more over the remainder of his company's territory. (Sinclair Record, p. 121.) In testifying about competitive conditions this witness states, in substance, that there is an ever increasing demand for gasoline and that in his opinion there is not too much equipment for the distribution of gasoline. (Sinclair Record, p. 123.)

J. M. Welch, a witness for the Commission, whose testimony appears Sinclair Record, pp. 125 to 131, both inclusive, testifies he is connected with the Illinois Oil Company of Rock Island, Illinois, operating in the territory covered by the States of Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kentucky, Tennessee and Oklahoma. (Sinclair Record, pp. 125-126.) As to competitive conditions in the territory of his company the witness testifies in substance that many dealers buy at the same time from

several different companies and that competition is active. (Sinclair Record, pp. 127 and 128.)

The complaint of the Commission alleges an active competitive condition among the many oil companies engaged in business in the territory referred to. Respondent respectfully refers to portions of the complaint, particularly Paragraph Two of Count I and Paragraph Two of Count II, (Sinclair Record, pp. 32 and 34, respectively), wherein the following language occurs:

> "* * * that there are numerous competitors of respondent who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various states of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased or loaned by such competitors of respondent to various persons, firms, corporations and copartnerships; that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one state to another and there is conducted by said competitors a constant current of trade in said products and devices between the various states of the United States; that respondent and many of its competitors have conducted their said business in a similar manner to that above described throughout the past four years."

"BAD MERCHANDISING."

What the Commission regarded as evidence of unfair methods of competition is nothing more than that some witnesses regarded the practice complained of as "bad merchandising."

There is a marked and fundamental distinction between so-called "bad merchandisings" and unfair methods of

competition. The Commission laid great stress upon an affidavit of Seth C. Drake, general manager of the sales department of the Standard Oil Company of Indiana, filed in a companion case bearing Number 85 on the Commission's docket. In referring to the practice of leasing and loaning equipment for a nominal consideration, Mr. Drake in this affidavit said that such practice was inaugurated by the competitors of his company and was adopted by such company merely as a matter of self defense to meet in good faith the competition offered by its competitors, and "that such practice had been and is contrary to the judgment of the sales managers of respondent (Standard Oil Company of Indiana), and is, in their judgment, bad merchandising." This affidavit was read by Commissioner Thompson to several witnesses and their opinion was asked on this proposition. In order to show that the testimony given by such witnesses does not disclose unfair methods of competition within the meaning of the Act, their testimony on this point will be briefly reviewed.

It should be borne in mind that a number of these witnesses in their testimony were not referring to the practice as followed by respondent, which permitted the dealer to sell gasoline and petroleum products of some other competitor, but were referring to a practice where the dealer was prohibited from dealing in any such products except those of the company furnishing the equipment. As before stated, the witnesses testifying concerning this exclusive contract arrangement are Charles L. Smith, W. L. Zust, H. E. Wormhoudt, W. E. MacEwen, O. L. Cordell and W. E. Williams.

From the testimony of Charles L. Smith, president of C. L. Smith Oil & Gasoline Company, St. Louis, Missouri (Sinclair Record, p. 56):

> "Q. Do you agree with that statement (referring to the Drake affidavit)?

A. Absolutely.
Q. Do you think it economically bad?
A. Absolutely." (Sinclair Record, p. 56.)

From the testimony of W. L. Zust, manager of Interstate Oil Company, La Crosse, Wisconsin (Sinclair Record, p. 61):

"Q. Would you say that this method of contracting by way of lease or otherwise for a nominal consideration of a pump and tank is bad merchandising, when bound up with the agreement that they should not use the oil or gasoline of another competitor? (In respondent's case the dealer was not restricted to the sale of respondent's gasoline except through respondent's equipment.)

A. Only under one condition could I see whereby it would be justified.

Q. What is that?

A. That is a small company has competitors that have service stations. They cannot afford to put in a service station and they might afford to put in one of these pumps in the hands of one of the dealers to make them act as their agent or under some similar arrangement of that kind.

Q. That would have the effect, would it not, of cutting off a competitor from getting his oil except from the person who was distributing?

A. It would depend upon the conditions under which the arrangement was made, whether it would be an exclusive arrangement or allow a fellow to handle both."

From the testimony of H. E. Wormhoudt, manager of Manhattan Oil Company of Des Moines, Iowa (Sinclair Record, pp. 66-67):

"Q. (By The Acting Chairman): I am interested in your statement that you would like to break up these two outstanding contracts that you have succeeded to. Why do you want to break them up?

A. It is not a proper arrangement, not a good arrangement from a business standpoint, Mr. Murdock.

Q. You do not regard it as good merchandising?

A. I do not.

Q. Why not?

A. If it is good merchandising there is no limit to which it can be carried. You might just as well furnish a man a truck and furnish him the other equipment in his garage. It might very easily lead to that." (Sinclair Record, p. 66.)

"Q. I wish you would explain that. I do not follow you on the truck proposition. What is the difference between a pump with a tank attached to it and a tin can containing gasoline?

A. I do not know that I get your thought, Mr. Murdock.

Q. If you sell a quantity of gasoline to a man, in a container, you may sell the container to him with the gasoline and it would be good merchandising?

A. Yes, sir, so long as we get a profit on the container it would be; yes, sir.

Q. If you give him a pump and tell him that he shall sell only your gasoline through that pump, and then you charge a price for the gasoline that nets you a return for the value you put into the pump, the money you spent to get the pump to give to him, why is it poor merchandising?

A. Because it never works out that way. You cannot, under the present conditions, charge sufficient for your gasoline to cover the offset. You cannot get more for your product than your competitor is getting; and the margin that you enjoy at the present time does not justify contributing this pump.

Q. Does not that depend somewhat on what the gasoline costs in the first instance?

A. It does; yes, sir. I am speaking of present conditions now. I say it is not warranted under present costs that we have to pay for our stuff, freight and overhead.

Q. If you had a competitor who could get his gasoline much cheaper than you can buy yours, would it not be profitable and a proper merchandising proposition for him to sell the pump, not give it away?

A. It might be.

Q. (By Commissioner Thompson): You would not consider it fair, though, would you?

A. I would not consider it fair. I would simply hold that to be an advantage that the other fellow's capital gave him. My ability to sell merchandise

might be as great as his, but I would not be able, under that proposition, to do business on a parity with him.

Q. (By The Acting Chairman): Then the deduction that I draw from your position in the matter is that you think it is unfair for one man to occupy a position, even by virtue of capital, whereby he could force another member of the community to buy at a loss. That is about your position?

A. That is my view; yes, sir." (Sinclair Record, p. 67.)

From the testimony of W. E. MacEwen, general manager of the National Refining Company, Cleveland, Ohio (Sinclair Record, p. 73):

"Q. Does it ever occur to you that the situation now differs materially from the old times when trade was small, units were small? In your boyhood it was quite common for the merchant to give something 'to boot.' It was in the shape of a gratuity. Giving a pump is something more, as I see it from what I have heard today, than giving something 'to boot.' Is it not?

A. Yes, sir; because you surround that with an iron clad agreement to compel that customer to buy your goods during the time he has that pump in there, whether the quality of the gas deteriorates or not. He is under that obligation to use your goods exclusively. You immediately affect the entire petroleum industry under this kind of a contract." (Sinclair Record, p. 73.)

It will be noted from the answer of the witness MacEwen that he is testifying concerning contracts whereby the dealer is precluded from dealing in any products except those of the company furnishing the equipment, which is not true as to respondent's contracts. Speaking generally of such *exclusive* contracts, the witness further testifies (Sinclair Record, p. 73):

"Q. Apart from the competitive necessity that you are under in making such a contract, did you consider it a good business proposition?

A. I certainly did not. I think it is a pernicious practice.

Q. Wherein is it pernicious?

A. It is pernicious in this way, that it tends to or can tend in time, as the automobile industry grows and as the garage becomes a substantial business—it can tend to put the control of the garage business in the hands of a few large companies that may have capital enough to finance that kind of competition—giving away of something to get business, thereby eliminating competition so far as the other companies are concerned that cannot afford to finance an extensive national campaign of giving away four or five hundred dollars every time they get a contract." (Sinclair Record, p. 73.)

From the testimony of JOSEPH F. KUNZ, secretary of Kunz Oil Company, Minneapolis, Minnesota.

Commissioner Thompson reading the Drake affidavit to the witness (Sinclair Record, p. 82):

"Q. Do you agree with that statement, that it is bad merchandising to give or lease at a nominal sum these pumps and tanks on condition that they will not sell the oil or gasoline of competitors? (Respondent's contracts do not contain such a condition.)

A. Yes, I do."

From the testimony of O. L. CORDELL of Sloan-Cordell Oil Company, Oklahoma City, Oklahoma (Sinclair Record, pp. 90-91):

"Q. (By Commissioner Thompson): Do you consider this giving away at a nominal price of tanks and pumps for a consideration that the purchaser will not use them for anybody else's oil but yours, a good practice in business?

A. No, I do not. I do not consider it good practice.

Q. Would you like to see it done away with?

A. If it could be done away with so it would not injure the small men in the business, like our company, I would like to see it discontinued. (Sinclair Record, p. 90.)

Q. (By Mr. Zechiel): Why do you think it is not a good business practice?

A. Simply because you have a large investment there. It is deteriorating all the time. If no one had them, you would have the same opportunity to get that business.

Q. (By Commissioner Thompson): Competition would be freer?

A. I do not know that it would be any freer than it is now. It probably would be somewhat, but I do not think we would get a bit more business, or any other company would; but we would all get business without the investment." (Sinclair Record, p. 91.)

* * * * *

"Q. Do you mean to say that if you did not have to furnish the oil tanks and pumps to your customers you could not compete more readily with the larger companies who have very much larger capital to invest in this sort of practice?

A. Here is the situation: the large companies are installing their own filling stations as fast as they can find locations. That necessitates larger investments. The small concern cannot do that on anything like as large a scale as the big companies do, and it seems in our part of the country that the larger concerns, particularly, some of them, are not trying to get this garage business. They are not trying to get any business where the gasoline is sold to be resold. They are trying to get all of the business they can through their own stations. As I see it, that is the end toward which they are all working, to market their gasoline direct to the consumer, cutting out the middle man, and thereby, in the course of time, cutting out the independent jobber." (Sinclair Record, p. 91.)

This witness further testifies (Sinclair Record, p. 93):

"Q. (By The Acting Chairman): I would like to ask, Mr. Cordell, this: take this company establishing a filling station, on the one hand, and a jobbing company selling gasoline on the other through pumps; in a contest between the two just what permanent advantage is given the man who has merely

the pump, over his competitor who has the filling station, if the man with the pump is given the privilege of giving it away to the retailer? Where is his advantage in that proposition in a permanent contest?

A. I do not see that he has any.

Q. Then would you say that there is no advantage in the long run in the privilege of giving away a pump to a retailer?

A. I would not say that, unless, the policy and marketing conditions in the business change. There is an advantage at this time. One of the greatest advantages to the loaning of pumps, in my estimation, is that after you once get a piece of business for your product, and your treatment satisfies your customer, you do not have to spend time and money seeing that fellow to hold his business, losing it and getting it back again. You have got it. The other companies, as a rule, have theirs, and I think, as far as actual values are concerned, the business is pretty well divided up. I do not know that any company would have any more." (Sinclair Record, p. 93.)

From the testimony of SETH C. DRAKE, general manager of the sales department of Standard Oil Company of Indiana. (Sinclair Record, pp. 107-108.)

Mr. Drake is handed his affidavit above referred to and Mr. Zechiel, representing the Commission, reads the pertinent portion, after which the testimony is as follows:

"Q. That is a fact, is it?

A. Yes, sir.

Q. How much of an investigation had you made at the time you signed this affidavit?

A. I had taken it up with the sales managers of the entire territory and got expressions from all of them.

Q. (By Commissioner Thompson): Why do you say it is bad merchandising? How do you arrive at that conclusion?

A. Because I never thought it was good merchandising to give a man something to get him to buy something from you."

From the testimony of H. F. BAGBY of White Eagle Oil Refining Company, Wichita, Kansas (Sinclair Record, pp. 109 and 111):

"Q. Is it your intention not to continue this practice or to adopt this practice?

A. Unless we are forced to it. We do not approve of the practice.

Q. Why do you not believe in the practice or approve of it?

A. It is not a profitable way of doing business, we do not think." (Sinclair Record, p. 109.)

* * * * *

"Q. (By The Acting Chairman): You consider it poor merchandising to give away something to sell something, do you not?

A. Yes, sir; that is our attitude." (Sinclair Record, p. 111.)

W. E. WILLIAMS, manager of the Iowa Oil Company, was of the opinion that in certain localities the practice was a good one. His testimony (Sinclair Record, p. 117), is as follows:

"Q. (By Commissioner Thompson): Do you consider it good merchandising to install a pump at a nominal price—as I understand it, that is what you do—and permit a competitor to also install a pump?

A. In some places that kind of an arrangement will work out all right. In others it would not. In the Dubuque territory there is nothing but hills. The people living away back on the hills, if they have to go down on the level to get their supplies, I think in that case it would be all right. Where the drive-in stations are handy I think it is all wrong. We have pumps located out at the outskirts of the city, and it is a very inconvenient matter for the people to go down to get their supplies. Generally those pumps are placed in some little store that is not financially able to get this equipment.

* * * * *

Q. Would it pay you to put in an investment at a nominal sum of three hundred dollars, with the purchaser at the same time putting in the pump of a competitor?

A. Well, no. The idea is here: If they wanted the competitor's line of merchandise they would probably make application to put their equipment in. This business has not been solicited by the Iowa Oil Company, itself, personally; this business has come to us with a request to place these stations at these different points as a matter of convenience to the trade." (Sinclair Record, p. 117.)

L. B. Hancock, manager of Pure Oil Company, Minneapolis, Minnesota, testified that he did not consider the practice as good merchandising because it was giving a man something for nothing, and that he would like to see it stopped. (Sinclair Record, p. 122.)

J. M. Welch, representing the Illinois Oil Company, Rock Island, Illinois, considered the practice as a good one until the advent of the drive-in filling stations, which he thought rendered the practice unprofitable in some instances, but did not condemn it for any other reason. His testimony (Sinclair Record, pp. 129-131) is as follows:

"Q. (By Commissioner Thompson): Do you consider it good merchandising to loan a pump at a nominal consideration to a company in consideration for their selling gasoline for you?

A. Yes, sir; I do.

Q. Do you think it is good merchandising?

A. I think it was good merchandising in the days it was in its bloom, in the days when it was universally followed.

Q. Do you consider it so now?

A. Now, I do not, because it is unprofitable on account of the filling stations.

Q. (By Mr. Burdeau): Is that your personal opinion, or the policy of your company?

A. No, sir; it is my personal opinion. Our company never made it a policy.

Q. Your company is actually opposed to that principle of doing business, is it not?" (Sinclair Record, p. 130.)

"A. We never depended or had to depend on garages and stores for business. We were running our business on different lines than depending on the dealer and the garage for the outlet of our products.

Q. It is not a fact that your company has signified to a representative of the Commission that it was opposed to that principle of doing business?

A. We did as a firm, but as a general practice I do not think it was detrimental to the community. It is safer to handle gasoline. These little dealers could not afford to buy the equipment themselves, and if some big oil company or a number of companies could get a pump and make it safe to handle the gasoline that way, I think it was a good thing.

Q. (By Mr. Zechiel): You testified that they could not afford to handle it themselves?

A. Could not afford to handle a pump.

Q. Could the oil company afford to put in a pump for a little dealer at a loss?

A. If they got a nominal rental of a dollar a month, that would pay at least 5 per cent interest on the investment.

Q. But in many cases they did not get any rental at all.

A. It probably was as cheap a way of getting and holding customers as any other way.

Q. Must it not have been a fact that the oil companies must have made money out of these pumps for these little fellows?

A. They did, I think.

Q. If they made a profit, could not the little man have afforded to have bought his own pump and made a profit?

A. No; the average dealer in these small towns and grocery stores and little garages—the investment would be too great for them. (Sinclair Record, p. 130.)

* * * * *

Q. Do you think it is good business for an oil company to lease or loan a pump to one of these small retailers who does not have business enough to make it profitable? (For the retailer to buy his own pump.)

A. In a great many cases I think it was good business." (Sinclair Record, p. 131.)

H. C. WURSTER, representing the Hawk Eye Oil Company, Waterloo, Iowa, did not consider the practice as a good business policy. (Sinclair Record, p. 133.)

PRICE.

The practice complained of does not increase the p paid by the consumer for products.

The Commission did not produce any evidence that price paid by consumers for petroleum products is in wise increased by the practice complained of. On contrary some of the Commission's witnesses test that the practice had not increased prices. Some nesses testified that the margin of profit, especially gasoline, is so narrow that it is really not profitabl local dealers to handle gasoline; and that the profits in fact made on lubricating oils and other petrol commodities.

In support of these statements respondent refer the following testimony:

> "Well, we in St. Louis have had the pleasur enjoying the lowest filling station market in the c try for the past two or three years, and the ma has been so small that we barely made expense operating through the other fellow's equipme (Sinclair Record, p. 54.) (Testimony of wit Chas. L. Smith.)
>
> "* * * the sale of lubricating oils, as I said fore, is very profitable, * * *." (Sinclair Rec p. 57.) (Testimony of witness Chas. L. Smith.)
>
> The margin on gasoline is small (Sinclair Rec p. 66.) The margin is considerably wider on lu cating oils than on gasoline. (Sinclair Record 69.) (Testimony of witness H. E. Wormhoudt.)
>
> We make a better margin on lubricating oil t on gasoline. (Sinclair Record, p. 91.) Garage claim they lose money handling gasoline. (Sinc Record, p. 82.) (Testimony of witness O. L. dell.)
>
> There is more profit in the sale of lubricating than there is in the sale of gasoline. (Sinclair ord, p. 110.) The construction and operation of ing stations does not make any appreciable differe in the price of gasoline. (Sinclair Record, p. 1 (Testimony of witness H. F. Bagby.)

There is a greater margin of profit on lubricating oil than on gasoline. (Sinclair Record, p. 118.) (Testimony of witness W. E. Williams.)

The margin of profit is considerably greater on lubricating oils than on gasoline. (Sinclair Record, p. 123.) (Testimony of witness L. B. Hancock.)

The average dealer in small towns, the grocery stores and little garages could not furnish their own pumps and make a profit on gasoline. (Sinclair Record, p. 130.) (Testimony of witness J. M. Welch.)

STIPULATION.

Evidence Covered by Stipulation.

Respondent did not produce any witnesses at the hearing before the Commission. Immediately preceding the hearing attorneys for the Commission and for respondent entered into a written stipulation as to certain facts and the same was received by the Commission and filed as evidence in the case.

This stipulation is to the effect that respondent in competition with others in the conduct of its business of refining and marketing petroleum and its products is engaged in interstate commerce, and incident thereto is engaged in the leasing and loaning of devices consisting of oil pumps and tanks; that respondent leases and loans such devices for a nominal consideration on the condition or understanding that the lessees thereof shall not store in and dispense from such devices any petroleum products other than those of respondent; that the rentals received by respondent under such lease contracts do not in all instances represent reasonable returns upon the investment in the devices when the business of leasing or loaning said devices and the returns received thereon are considered separate and apart from the general business and sales policy of respondent. (Sinclair Record, pp. 135 to 138, both inclusive.)

ARGUMENT AND AUTHORITIES.

The Federal Trade Commission is without jurisdiction o authority to make its order, directed against this r spondent, to cease and desist.

A. *No Offense Charged by the Commission's Complai*

The Commission's complaint consists of two counts, th first being based on Section 5 of the Act of Congre approved September 26, 1914 (38 Stat. L. 717) known a the Federal Trade Commission Act; while the secon count is based on Section 3 of the Act of Congress ap proved October 15, 1914 (38 Stat. L. 730), known as th Clayton Act. (Sinclair Record, pp. 32 to 35, both inc sive.) Respondent contends the complaint fails to charg violation of either of said sections of said Acts.

In proceeding under the Federal Trade Commissio Act, before complaint should issue, two things are nece sary:

1. The Commission shall have reason to believe tha respondent has been or is using an unfair method o competition in commerce; *and*,

2. It shall appear to the Commission that a proceed ing by it in respect thereof would be to the interest o the public.

These are correlative propositions. There must b basis in fact for the belief that both situations exis It must appear there is in use an unfair method of com petition affecting the public. Based on these essential the Commission shall issue and serve a complaint statin its charges "in that respect" and give opportunity to th

accused to show why an order should not issue directing it "to cease and desist from the violation of the law so charged in said complaint." If after a hearing the Commission shall be of the opinion "the method of competition in question is prohibited by this Act," it shall state its findings as to the facts, and shall issue an order requiring the accused "to cease and desist from using such method of competition."

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 427.

It is respondent's contention the Commission is without authority to proceed under the Federal Trade Commission Act except in question of public interest. When a complaint issues the respondent is entitled to be advised specifically thereby what public interest is affected, and in what way and to what extent it is affected, by the methods and practices complained of. Otherwise the respondent is not fully apprised of the charges it is required to meet and defend against.

Preliminary and introductory to the allegations in COUNT I of the complaint a general statement is made that respondent "has been using unfair methods of competition in interstate commerce, * * * and it appearing that a proceeding * * * in respect thereof would be to the interest of the public, * * *" a complaint issues. Then follows COUNT I, consisting of three numbered paragraphs. The broad general language quoted is all that is used in connection with COUNT I in charging that what is alleged is either an unfair method of competition or a matter affecting the public. This language, under the most liberal interpretation, is not sufficiently definite or specific to advise respondent wherein the things complained of are unfair methods of competition or in what manner the public is thereby affected.

The first count of the complaint charges a competitive condition or situation arising between individual refining or marketing companies through a practice adopted by respondent and many of its competitors; but not adopted, it is alleged, by some of respondent's competitors. It is alleged as a mere conclusion that those of respondent's competitors who have not adopted the practice complained of have lost customers or business, and that such competitors have failed to follow such practice by reason of their financial inability so to do. It is not specifically charged that the practice alleged to have produced this situation is an unfair method of competition.

COUNT II of the complaint is based on Section 3 of the Clayton Act. Preliminary and introductory to the allegations in COUNT II of the complaint a general statement is made that respondent "has been using unfair methods of competition in interstate commerce, * * * and it appearing that a proceeding * * * in respect thereof would be to the interest of the public, * * *" a complaint issues. Then follows COUNT II, consisting of three numbered paragraphs.

The complaint concludes with a notice of hearing and of the time within which answer must be filed.

What has been said by respondent in respect to COUNT I as to the want of specific and definite allegations is applicable with equal force to COUNT II.

In the second count of its complaint the Commission seeks to charge that respondent is engaged in the leasing and loaning of devices on the condition, agreement or understanding that the lessees thereof *shall not purchase or deal in the products of a competitor or competitors of respondent.*

Section 3 of the Clayton Act makes such agreements unlawful "where the effect of such lease * * * may

be to substantially lessen competition or tend to create a monopoly in any line of commerce." The complaint charges that the effect of such leases may be and is to substantially lessen competition and tend to create a monopoly *in the territories and localities where such contracts are operative*. The statute seeks to curb that which may lessen competition or tend to create a monopoly in any line of commerce, thus dealing with the subjects of commerce; while the complaint is directed to the territorial limits or localities of commerce, thus dealing with the *place* rather than the *subject* of commerce. There is a total variance between the language and provisions of the statute and the allegations and averments of the complaint. In order to give this count of the complaint force or effect it is necessary to read into it, and to assume that it contains, something not found there.

Both counts of the complaint charge that in respect to the devices, the subject of the complaint, there is produced by respondent and numerous competitors of respondent a constant current of trade in commerce which has continued over a period of four years last past. In the second count there is no allegation that any of respondent's competitors are not similarly engaged in commerce; in fact the allegations lead to the conclusion that all refiners and marketers are so engaged. These allegations and averments support the conclusion there is in such commerce no lessening of competition nor tendency to create a monopoly.

Clearly the complaint does not properly or sufficiently allege an unfair method of competition affecting public interest within the proper meaning of Section 5 of the Federal Trade Commission Act.

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within a proper meaning of these words, there is no founda-

tion for an order to desist the thing which may be prohibited is the method of competition specified in the complaint."

Federal Trade Commission v. *Gratz*, 253 U. S. 421, 427.

The complaint is clearly insufficient to show that the effect of the practice complained of may be to substantially lessen competition or tend to create a monopoly in commerce. The fair interpretation of the complaint shows a counter effect. Under the rule of construction announced in the Gratz case, *supra*, this count must fail. Construing the complaint in connection with the sections of the Acts of Congress referred to, it appears there is no occasion for the issuance thereof and that the complaint is improvident.

Respondent contends, if all of the allegations of the complaint be taken as true, no offense is charged. To put it in another way: the complaint neither states a cause of action nor charges an offense under Section 5 of the Federal Trade Commission Act or Section 3 of the Clayton Act. While the subject matter of the complaint may be within the Commission's jurisdiction under said Acts; yet the allegations of the complaint are insufficient to bring the subject matter or respondent under the jurisdiction of the Commission in the particular instance for the specific purpose sought by the complaint. No charge is made that warrants the exercise of the Commission's authority, and it should not have heard and considered this cause.

B. *The Commission's Report, Findings and Conclusions Are at Variance With and Do Not Support the Complaint.*

The report, findings and conclusions of the Commission are in substance that respondent in the conduct of its

business in leasing and loaning devices constantly moves the same from one state to another and thereby conducts a constant current of trade in its products and such devices in interstate commerce; that numerous competitors of respondent are likewise engaged and likewise conduct a constant current of trade in petroleum products and devices in commerce; that such leases and loans of devices by respondent are made for monetary considerations below the cost of purchasing and vending the devices when the business of leasing or loaning the same and the returns received thereon are considered separate and apart from the general business and sales policy of respondent; that such leasing and loaning by respondent are on the condition that the devices *shall be used only for the purpose of holding and storing respondent's petroleum products;* that a small porportion of respondent's lessees handle similar products of respondent's competitors; that only a small proportion of such lessees require or use more than a single pump outfit in their business; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does, partly by reason of which such competitors have lost numerous customers to respondent; and that the effect of the practice of such leasing under such conditions may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products. The Commission then states its conclusions that such methods and practices are in violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act. (Sinclair Record, pp. 139 to 143, both inclusive.) On these findings it bases its order to cease and desist. (Sinclair Record, pp. 143 to 144, both inclusive.)

It is not stated, and there is nothing to indicate, in

the report and findings that the practice complained of comes within the provisions of either or both said sections of the Federal Trade Commission Act or of the Clayton Act. Certainly it is not found that the practice is either an unfair method of competition or one that affects public interest within the purview of the Federal Trade Commission Act. An attempt is made to conform the findings to the provisions of the Clayton Act by stating that the practice may be to substantially lessen competition and tend to create for respondent a monopoly in the business of selling petroleum products. But the findings lack one essential element to bring them within this Act; there is a total failure to find that respondent's lease contracts are conditioned that *the lessee shall not use or deal in the products of a competitor of respondent.* The finding is that respondent's *lessees shall use its devices only for the purpose of holding and storing respondent's petroleum products.* There is a total variance between the allegations of the complaint and the report, findings and conclusions of the Commission. The Commission fails to find what it charges. The thing which may be prohibited is the method of competition specified in the complaint. If the findings are at total variance with the complaint then an order based on such findings is incompatible with the complaint and cannot stand.

> "Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."
>
> *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427.

The Commission makes its conclusions which are the general ones that the methods of competition and the business practices set forth in its findings as to the facts are in violation of the provisions of said sections of

said Acts. The conclusions are broad and general. For enlightenment wherein the methods of competition and the business practices of respondent violate said Acts, the respondent is referred by the conclusions to the findings as to facts. Respondent's recourse to the findings fails to advise what competitive methods practiced by it are in violation of said Acts, or wherein they violate the same.

C. *The Order of the Commission Does Not Follow Its Complaint.*

On its report, findings and conclusions the Commission bases its order to cease and desist. (Sinclair Record, pp. 143 to 144, both inclusive.) The order does not amplify such findings or make the same any more specific.

The order directs respondent to cease and desist from:

> "1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.
>
> 2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made."

Respondent assumes that it will find in the order a complete and concise statement of those practices which the Commission regards as being unlawful, that is as violating Section 5 of the Federal Trade Commission Act or Section 3 of the Clayton Act, or both said sections.

In the first paragraph of the order respondent is required to cease and desist from leasing its devices in the furtherance of its petroleum business at a rental which will not yield to respondent a reasonable profit on the cost of the devices after making due allowance for depreciation and *other items* usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom. In effect this provision requires respondent to obtain a reasonable profit from the rental of its devices; but whether in cash or otherwise the order does not state. The record does not disclose that any person, firm or corporation is engaged exclusively in leasing and loaning devices, and there is therefore no standard of rental values obtainable from a source of this nature. Respondent's business is transacted over a wide territory. In the several states in which it conducts business and in the several parts of those states standards of values differ. What may be regarded in one locality as a reasonable rental profit may in other localities be considered as wholly inadequate or greatly excessive.

The order bases on the cost of the devices the rental profit to be derived. The record discloses that some refiners and marketers buy devices at wholesale, while others buy at retail. Unquestionably, the former buy at less cost than the latter. In basing a rental profit on the cost of the devices the order does not advise whether the wholesale or retail cost shall be the basis. Under such circumstances there is possibility, in fact probability, of a

variance in rental charges that may be imposed by marketing companies.

The order further provides that the profit to be derived shall be based on the cost of devices *after* making due allowance for depreciation and other items usually considered when leasing property for profit. The order does not specify what shall be considered as included in "other items." Apparently it is left to respondent to make the allowance for depreciation and other items, and to determine for itself what shall be covered by the term "other items." The order does not specify who is to be the judge of the reasonableness of the profits to be derived from rentals of devices. It would seem that respondent in conducting its own business is in the best position and is best qualified to determine the reasonableness of its returns from such rentals. It is respondent's view that it is not within the province of the Commission to fix and determine the rate or charge for which respondent shall lease or loan its oil pumps and tanks.

In the case of the *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428, this language is used:

> "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

In this proceeding and in this provision of the order the Commission has viewed the leasing and loaning of devices by refiners and marketers as a separate and distinct business. Respondent contends it is unfair to consider this item of business separate and apart from its general business and its general sales policy. Respondent also urges, if it is left to determine the "other items" in addition to depreciation for which allowance shall be made in determining its rental charges, it is proper for

respondent to consider the following as included in "other items":

1. The advertising value and advantage to it of its loaned equipment bearing its trade name or trade mark, installed at points of vantage where the same may be seen and observed by the consuming trade.

2. The safety, convenience and accommodation such equipment affords to respondent's customers.

3. The prevention of waste and deterioration of petroleum products sold by respondent.

4. The lessening of respondent's liability for damages from fires or explosions through the handling by its customers and the delivery to the trade of respondent's petroleum products.

5. The reasonable guarantee to the consuming trade of the delivery to it of respondent's petroleum products through such devices.

6. The service and convenience which are afforded the public in obtaining respondent's petroleum products through proper and safe equipment furnished by respondent.

7. The compliance with statutes, ordinances and regulations in the storing, handling and marketing of respondent's petroleum products.

It is urged by respondent that this provision of the Commission's order is without its jurisdiction and authority.

The second provision of the Commission's order requires respondent to cease and desist from entering into or continuing contracts or agreements with dealers in respondent's petroleum products whereby such dealers agree or have an understanding that as a consideration for leasing to them of devices that same shall be used only for storing or handling the products of respondent. It

appears the inhibition has application only to the condition that the equipment shall be used only for storing or handling the products of respondent. In effect this is saying to respondent that it has not the right to determine and impose the conditions on which its equipment shall be leased. Perhaps the Commission might have authority under the Clayton Act to restrict respondent from leasing its devices on the condition that the lessee "shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor of respondent." But we certainly question the Commission's authority to restrict respondent from leasing its devices on the condition that the same shall be used only for storing or handling the products of respondent. Otherwise, the order of the Commission is a new departure in the matter of leasing and loaning property. The title to the devices remains in respondent. It retains its investment therein. It has the right to impose on the lessee the manner in which it shall be used and that such use shall be for a lawful purpose. The prohibited condition contained in this provision of the order is not in violation of either of the Acts of Congress under consideration, and neither of said Acts warrants the Commission in making this provision of its order.

By the order respondent is restrained from doing either one of two separate and distinct acts. Provision is not made that one act shall be contingent on the other. The order regards the performance of either as a separate and distinct offense. In construing the order it is necessary to so regard these two provisions thereof.

Concluding the argument on the question of jurisdiction it is submitted that the Complaint is wholly insufficient to charge an offense under either of the Acts of Congress involved; that the Commission has not alleged facts in such Complaint sufficient to vest it with jurisdiction to

hear and consider the different matters complained
that there its a total and fatal variance between the
gations of the Complaint and the Report, Findings
Conclusions of the Commission; and that the Order
not follow the Complaint, and is not in accord with
Commission's Findings. For the reasons herein st
respondent views the Commission's Order as an exce
its authority and believes that such Order should be
aside.

RESPONDENT'S ARGUMENT IN ANSWER TO COMMISSION'S SPECIFICATION OF ERRORS.

Primarily this respondent is concerned only in those errors which the Commission has charged were committed by the Circuit Court of Appeals for the Seventh Circuit in deciding respondent's case. These are seven in number and in this brief will be discussed in the order in which they appear in the Commission's brief.

The Commission contends there was error:

1. *In holding that the practice may not be held to be an unfair method of competition unless it amounts to a fraud upon some public or private right.*

That part of the decision complained of reads as follows:

> "The jurisdiction under Section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the Kinney-Rome case, *supra* (275 Fed. 665), amount to an unfair method of competition."
>
> *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686, 687.

The statutory reference is to Section 5 of the Federal Trade Commission Act. By the statute "unfair methods of competition in commerce are declared unlawful," and the Commission is "empowered and directed to prevent persons, partnerships, or corporations, from using unfair methods of competition in commerce." The words "unfair methods of competition" are not defined by the statute. The portion of the opinion, above set out, is in the nature of a definition of the words "unfair methods of competition."

This pronouncement by the court is in conformity with previous decisions and expressions on the subject.

This Court, speaking through Mr. Justice McReynolds has said:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."
>
> *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427.

In *Goodyear, etc., Co.* v. *Goodyear Rubber Co.* 128 U. S. 598, it was said at p. 604:

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

In *Howe Scale Co.* v. *Wyckoff, etc.*, 198 U. S. 118, the Court stated:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, it is said:

> "Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosed packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into

buying their wares under the impression they are buying those of their rivals."

Unfair competition is thus defined in Cyc., Vol. 38, p. 756:

"Unfair competition consists in passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an expressed or implied representation to that effect. And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of affecting the result."

In Am. & Eng. Ency. of Law, 2d Ed., Vol. 28, p. 409, the following definition is given:

"Unfair competition may be defined as passing off, or attempting to pass off, upon the public the goods or business of one man as being the goods or business of another. Any conduct tending to produce this effect constitutes unfair competition and may be enjoined. The means employed are wholly immaterial. The plaintiff need not show a proprietary interest in the names or symbols employed by the defendant to work the deception. Nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition."

In Nims on Unfair Competition, 2d Ed., p. 2, it is said:

"In the past equity courts usually have not regarded an act as actionable under the law of unfair competition unless such act constituted a passing off of the goods of one person as those of another. In England unfair competition is termed 'Passing Off,' although in other countries the concept of it is much broader than mere passing off of goods."

On p. 4 of the same work, it is said:

> "The legal doctrine of unfair competition is a development of the fundamental idea that it is against public policy that the goods of one person should be offered for sale or sold as those of another."

It can readily be seen how far short of these requirements the acts of respondent fall. There is not the slightest suggestion that respondent is trying to pass off its products as those of a competitor. On the contrary, the dominant purpose of respondent is to guarantee to the public that it is buying respondent's products and not those of a competitor. The practice complained of is peculiarly designed to prevent unfair competition rather than to foster it. The practice was openly followed not only by respondent but, as conceded by the Commission in its complaint against respondent and as shown by the evidence, by a large majority of the marketers of gasoline.

The practice does not prevent any competitor from coming into the same territory and locating pumps and tanks at any point where a market can be found. A sales policy cannot properly be held unfair simply because some competitors, for personal reasons, do not care to dispose of their products in such manner. No court has ever denied, nor have economic theories gone to the extent of denying, to a business organization the right honestly to use its capital to meet the growing demands of a trade, or to furnish facilities and conveniences to the public not previously enjoyed by it. The very universality of the practice, while not conclusive of its propriety, is evidence that the trade has sanctioned it as fair and legitimate.

This holding of the court below is supported by the record and by the authorities.

It is asserted by the Commission that the court erred

2. *In not holding that the methods of competition which have a dangerous tendency unduly to hinder competition are unfair within the meaning of the statute, though the element of fraud be entirely absent.*

It would seem this assignment of error is merely a restatement in another form of the Commission's first assignment of error. It is believed respondent's answer to the first assignment of error sufficiently answers the second one. Furthermore, it is respondent's view there is nothing in the record which warrants the statement, or even the inference, that the practices of respondent have a dangerous tendency unduly to hinder competition. It is felt respondent has aptly shown this by citations from the record set forth herein. (*Ante*, pp. 33-37.)

In any event, it is our view that in order to bring a method of competition within the definition announced in the *Gratz* case, *supra*, it is necessary that there must be present in the method some element of fraud affecting some public or private right.

As to the Commission's complaint that the court erred:

3. *In holding that the leasing of tank and pump equipment at a nominal rental is not an unfair method of competition as against manufacturers of this equipment.*

Respondent does not manufacture tanks or pumps, or their equipment. It purchases the same in large quantities from the manufacturers thereof. This record is absolutely silent as to any complaint by manufacturers of this equipment on the subject of respondent's practice of leasing and loaning pumps and tanks. The method of storing and dispensing gasoline has resulted in a marked increase in the number of tanks and pumps used. The practice complained of has established in business a large number of dealers in various localities not theretofore so engaged. There has opened to the manufacturer of such

devices a market not theretofore enjoyed by him. Obviously, from the viewpoint of manufacturers of devices this wholesale market should be preferable to retail selling to widely scattered local dealers.

At page 11 of its brief the Commission states that the case involves leases to public garage owners and to proprietors of "curb pump stations," but more particularly the latter class.

It has been pointed out in this brief (*Ante*, pp. 28, 30, 31 and 32), that it is the practice of many garage owners to have more than one tank and pump outfit, sometimes owning one outfit, and in addition thereto sometimes leasing such outfits from more than one refiner or marketer.

The Commission erroneously assumes that the thousands of curb pump operators now engaged in business were so engaged when the practice of leasing and loaning equipment was instituted. It is readily discernible from the record and from the history of the practice that a great majority of these so-called dealers were established and set up in business by refiners and marketers and that without the practice large numbers of such dealers would not now be so engaged. As has been said in the Commission's brief, (page 28) the tank and pump constitute a dealer's store. The dealer had, or there was acquired for him, a location at a curb or roadside, at which a place of business was established for him by some marketer or refiner through the loaning and installation of tank and pump; the further inducement being that the refiner or marketer would supply such dealer with the oil products required in his business.

It does not appear that manufacturers of pumps and tanks are also engaged in the business of selling oils. Such manufacturers therefore have not the inducement that a marketer or refiner has to persuade one to engage

as a dealer in oils. The dealer as such usually is created by the refiner or marketer. Probably, of his own volition, he would never have embarked as a dealer, and quite certainly, under all circumstances, as a dealer he would not have been brought into existence by the pump and tank manufacturer, and the establishment of such dealer by a refiner or marketer in the competitive field results beneficially to the manufacturer of the particular equipment involved. It would seem the manufacturer could have no legitimate ground of complaint if a dealer acquires his equipment indirectly instead of directly, or if such dealer does not purchase more equipment than his business requires.

The respondent having purchased its tanks and pumps from the manufacturers, it would seem wholly immaterial to such manufacturers what disposition the respondent may make of the equipment.

There is no condition in respondent's form of contract which in any wise prevents the lessee thereunder from purchasing from the manufacturer any additional pumps and tanks the dealer may require or desire, nor is the lessee prevented thereby from receiving and installing similar equipment of any competitor of the lessor.

It is respondent's view that the marketing field of pump and tank manufacturers has been widely extended and greatly intensified by the leasing and loaning practice, now so nearly universal.

We think the court below was fully justified and clearly correct in holding as it did.

The Commission urges that the court erred:

4. *In holding that the equipment is not leased upon the condition that the dealer shall not sell the products of a competitor of the lessor, though the Commission*

found that only a small proportion of dealers require or use more than one such equipment.

This specification of error amounts to the statement that the court erred in not holding that the *effect* of what the Commission found amounts to what the Commission *charged* to be a violation of Section 3 of the Clayton Act.

It has heretofore been pointed out in this brief (*Ante*, pp. 28, 29, 31 and 32), that the evidence does not support the Commission's finding that only a small proportion of dealers require or use more than one such equipment.

The portions of Section 3 of the Clayton Act, pertinent here, are as follows:

> "That it shall be unlawful * * * to lease goods, etc. * * * for use * * * within the United States, etc. * * * on the condition, agreement or understanding that lessee * * * shall not use or deal in goods, etc. * * * of a competitor or competitors of lessor * * * where the effect of such lease * * * or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Apparently the Commission's position is reduced to these two propositions:

1. While admitting the lease condition complained of does not expressly go to the prohibited statutory extent in the Clayton Act in the restriction of the lessee, it asks this Court to find that the restriction is within the prohibition of the Clayton Act; *and*

2. It further asks the Court, if it find as above, that it further find such restriction has a *possible* tendency toward monopoly.

The covenant contained in respondent's form of contract is as follows:

> "The above described equipment shall be used by

the party of the second part for the sole purpose of storing and handling gasoline supplied by the party of the first part." (Sinclair Record, p. 137.)

It will be observed that this condition applies only to gasoline, and not to other petroleum products, of which lubricating oils are the most profitable. (*Ante*, p. 48.)

As further evidence that respondent's form of lease agreement does not tend to monopolize or restrict the lessee, but in fact makes such lessee practically independent of the respondent as lessor, attention is directed to a further provision of respondent's lease, under subdivision number 6 thereof (Sinclair Record, p. 137), the pertinent portion of which is as follows: "*Upon the termination of this license by whatever means effected, the party of the second part (lessee) shall have the right and option at such time to purchase said equipment by paying therefor the sum of* ....."

It is at all times within the power of the lessee to terminate this contract whenever he might care so to do, and he could prevent the removal of the equipment covered thereby upon payment to respondent of the sum specified as the value of the equipment. It is made possible for any of respondent's competitors to induce the lessee so to terminate the agreement, and, if the competitor choose, supply the lessee funds with which to purchase the equipment covered by the agreement.

Under respondent's form of equipment rental agreement the lessee is in no wise restricted, except that so long as title to the equipment remains in respondent the lessee shall use the same for the sole purpose of storing and handling gasoline supplied by respondent.

The Commission takes the position that the "facts" behind the express wording of the contract bring the lease within the prohibition of the Section. This position cannot be successfully maintained:

First, because the language of the Act cannot be so

broadened as to include contracts not expressly prohibited thereby. If Congress had seen fit to include any classes of contracts other than those enumerated in this Section, it would have done so.

Second, the "facts" do not bring respondent's leases within the prohibitions of the Section.

In support of the Commission's assertion that they do, it is stated:

"(a) That it is extremely rare that a dealer having equipment leased under these terms will have more than one pump and tank outfit upon his premises."

It may be conceded that in the majority of cases these small retail dealers have only one pump outfit; but it cannot be seen what this situation has to do with an agreement of the lessee of pump equipment to use through such equipment only the gasoline of the marketer furnishing the equipment. The fact that retail dealers do not have more than one equipment is not because of any contract relations with respondent or the various other marketing concerns leasing equipment as does respondent, but is solely because there is not sufficient business to justify more than one outfit.

The Commission advances the theory that if a dealer has no business need or use for an additional outfit he will necessarily not install it, and the result is that he *can*, under his contract, deal only in the gasoline of the lessor. The Commission admits that the dealer has a privilege which under the circumstances he will not exercise. It being thus conceded, as it must be, that the lessee has the privilege of dealing in the gasoline of a competitor, how can respondent be charged with an infraction of the law because the lessee does not see fit to exercise rights of which respondent has not sought to divest him? Respondent's guilt or innocence cannot be determined by the acts or omissions of its lessees. If all or the larger

portion of such lessees had, in addition to respondent's equipment, one or more outfits of their own or its competitors, the Commission would not undertake to contend that respondent had violated the Act. Reduced to its ultimate analysis, the question of violation, or not, under the Commission's view depends on the number of lessees whose business is such as to justify more than one pump outfit.

It is shown by this record that in the majority of cases the dealer with whom such equipment is placed did not previously deal in gasoline, and the respondent, or other marketer furnishing the equipment, established a new business and added a new competitive factor instead of restricting competition. It is further shown that this equipment is generally placed with dealers who are not financially able to purchase it and who would not otherwise engage in the sale of gasoline. Unless respondent or some other marketing company thus furnished the equipment, there could be no complaint from any competitor for there would be no market for his products at this particular location; in other words, the market is created by the acts of the marketing company furnishing the equipment. Competition has not been lessened because there was no market to call competition into play until the retail station was established by the installation of the equipment. After such installation is made under respondent's form of agreement, competition is not lessened thereby within contemplation either of the Clayton Act or of the Federal Trade Commission Act for the reason that such agreement does not fall within the provisions of either of said acts.

Every advantageous street corner or location on a public highway offers a possible location for a "curb pump station," where any marketer or refiner, if he be so disposed, may install in business a dealer by leasing to him a

tank and pump outfit. It is respectfully submitted tha the company does not exist that could monopolize all suc locations, or supply them with gasoline.

The order of the Commission, if carried out, woul stifle competition rather than leave it free. Without th order any marketer can establish himself in practicall any locality. The smaller companies say that the practic of leasing equipment is to them a weapon of offense an defense; it being their principal method of competitio against the growing practice of the larger companies o establishing drive-in service stations. (Sinclair Record pp. 90 and 91.)

In its brief the Commission seeks to fortify its positio by citations from *Standard Fashion Co.* v. *Magrane-Houston* (decided by this Court on April 10, 1922), an *United States* v. *United Shoe Machinery Co.* (decided b this Court on April 17, 1922). Both cases are readily dis tinguishable from the case under consideration.

The contract under consideration in the first case con tained an agreement that the dealer should "not sell o permit to be sold on its premises during the term of it contract any other make of patterns." In discussing this clause this Court quoted with approval the following observation of the Circuit Court of Appeals:

> "The restriction of each merchant to one patter manufacturer must in hundreds, perhaps in thou sands, of small communities, amount to giving suc single pattern manufacturer a monopoly of the bus ness in such community. Even in the larger cities, t limit to a single pattern maker the pattern busines of dealers most resorted to by customers whose pur chasers tend to give fashions their vogue, may ten to facilitate further combinations; so that the plain tiff, or some other aggressive concern, instead o controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

There the retailer was restricted by the contract to the sale of patterns of one manufacturer. In respondent's case the dealer is not restricted to the use of the respondent's equipment or to the sale of respondent's products; he must store and dispense through respondent's equipment no products other than those of the respondent. The dealer may at any time terminate his arrangement with the respondent, and upon termination of the agreement he may purchase respondent's equipment at the price stipulated in the agreement. Under these conditions it would seem that the provision in respondent's form of contract cannot serve to lessen competition or have a tendency to create a monopoly within the contemplation of the statute.

In the *Shoe Machinery Corporation* case the Court found that defendant was using, and decreed that defendant should be enjoined in the use of:

"(1) the restricted use clause, which provides that the leased machinery shall not, nor shall any part thereof, be used upon shoes, etc., or portions thereof, upon which certain other operations have not been performed on other machines of the defendants; (2) the exclusive use clause, which provides that if the lessee fails to use exclusively machinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased; (3) the supplies clause, which provides that the lessee shall purchase supplies exclusively from the lessor; (4) the patent insole clause, which provides that the lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the defendants' machines; (5) the additional machinery clause, which provides that the lessee shall take all additional machinery for certain kinds of work from the lessor or lose his right to retain the machines which he has already leased; (6) the factory output clause, which requires the payment of a royalty on shoes operated upon by ma-

chines made by competitors; (7) the discriminatory royalty clause providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor."

The condition in respondent's form of lease is that the equipment covered thereby shall be used for the sole purpose of storing and handling the gasoline supplied by respondent. The lessee is free to use other equipment, whether purchased or leased; he is free to buy and sell any marketer's or refiner's products; he is at all times free to cancel his agreement with the respondent; and upon cancellation of the agreement the lessee is free to and has the right to buy the respondent's equipment.

We think the court below correctly held "there is nothing in the evidence nor in the findings of fact by the Federal Trade Commission that supports any such charge," the charge referred to being that respondent made leases for the container and pump and fixed the price therefor "on the condition, understanding and agreement that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent."

If this portion of the charge is unsupported, assuredly it could not correctly be found that the effect of the condition in respondent's form of lease "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Commission asserts that the court below erred:

5. *In holding that the Commission's order fixed or regulated the rentals of equipment.*

The Commission made the following, among other, findings:

"* * * that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equip-

ment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same * * *." (Sinclair Record, p. 140, subdv. 3.)

That part of the order referred to reads as follows:

"Now, therefore, it is ordered, that respondent, Sinclair Refining Company, shall cease and desist from:

1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

Provided, however, that as to such pumps and tanks and equipments as are now leased by respondent contrary to the orders contained in paragraphs 1 and 2 herein, respondent shall have four months from the date hereof to enter into new contracts or agreements with respect to the same which shall not be incompatible with the spirit and intent of this order.

It is also ordered, under and by virtue of the authority conferred on the commission by paragraph B of section 6 of 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, that the said Sinclair Refining Company, respondent, shall within 20 days after the expiration of the time allowed within which respondent shall have fully complied with the order to cease and desist, hereinabove set forth, report in writing to the Federal Trade Commission, fully setting forth the nature of the changes made in the conduct of its business with respect to the subject matter involved in the order to cease and desist, and shall be set forth in such report in complete detail the plan or plans adopted for the lease, loan, gift, or sale of any oil tanks and pumps

for use in storing refined oil or gasoline, which plan or plans are in use or are proposed to be put in use, and also attach to such report any contracts used by the respondent in the conduct of such business." (Sinclair Record, p. 144.)

In passing upon this matter the court said:

> "The necessary conclusion from the above findings and the orders entered is: First, that the Commission deemed it lawful and proper for it to condemn certain rentals and also to fix and regulate the rentals on the equipment; * * *. As we have hereinbefore said, Congress did not bestow upon respondent (Commission) any power to regulate or fix prices (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 312); nor do we find anything in the law which indicates that it is illegal for one competitor to do that which is beyond the financial ability of another competitor; nor do we find anything that authorizes respondent to regulate competition for that reason." *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686.

By the order this respondent was enjoined from leasing equipments at a rental which would not yield a reasonable profit on the cost thereof, after making certain allowances and deductions; and this respondent is required to report in detail to the Commission the manner of its compliance with the order, the plan or plans adopted for the leasing of equipment, submitting therewith any contracts used by the respondent in that connection. It is true this order does not specify in exact figures the rental rate to be obtained by respondent but it does point out the method by which such rental rate shall be determined and computed. Such computation and determination of the rental charge are required to be reported to the Commission and be subject to its supervision and regulation. It is difficult to see what object the Commission would have in requiring respondent to report in detail to it, submitting forms of its lease agreements, in compli-

ace with the Commission's order, unless the Commission tended to exercise supervision thereover, and give expression of approval or disapproval of the report, the orm of lease agreements, and the rental charges specied therein. If the Commission did not so intend, it ould seem that part of the Commission's order is an idle nd futile thing, and there would otherwise be no object requiring this respondent to comply therewith in the anner specified.

It is our view the court below committed no error in olding as it did.

The Commission also urges that the court erred:

6. *In failing to distinguish between the leasing of quipment upon a nominal consideration for the purpose nd with the effect of suppressing competition in the sale f gasoline and oils, and the usual and ordinary case of a ase of real or personal property with limitations upon he use of the property which did not accomplish an unlawful end.*

The court found that respondent's form of lease agreement is *not* conditioned on the agreement or understanding that the lessee shall not use or deal in the goods of a competitor and in that connection stated that the provisions of Section 3 of the Clayton Act "were the substance of the unproven charge in respondent's complaint against petitioner (Sinclair Refining Company)." The court's pronouncement in this respect is in conformity with the Commission's findings. The specific charge under Section 3 of the Clayton Act as set forth in the Commission's complaint is not supported by the evidence. The Commission so found, or at least it did not make a finding that the charge in the complaint is supported by the evidence. The Commission now complains because the court's finding in this respect conforms to its own finding. The Com-

mission should not be supported in this inconsistent pos
tion.

The court below reached the conclusion that as th
charge in the Commission's complaint was unproven an
unsupported, the contract of this respondent was ther
fore not unlawful; and it found that respondent did, an
had the right to, impose upon the lessee of its propert
lawful conditions as to its use. In comparing the limit
tions between real estate leases and the leasing or hirin
of personal property, the court below announced th
proper rules.

The Commission insists that the court erred:

7. *In holding that some* 450 *retail dealers, parties t the leases, were necessary parties respondent to the Co mission's complaint.*

It seems to respondent the Commission has incorrect stated the holding of the court in this connection. Th language in that respect is as follows:

> "In this case, as in *Fruit Growers Express* v. *Fe eral Trade Commission*, 274 Fed. 205, if an order cease and desist is to stand, the effect of the action the Federal Trade Commission seems to have be to terminate and destroy the contractual rights persons not parties to the proceeding."

This is far from saying that this respondent's lesse are necessary parties to the proceeding. The statemen is, if the order stands, the *effect* seems to have been terminate and destroy contractual rights of persons n parties to the proceeding.

Unquestionably the effect of the order of the Comm sion is to cancel respondent's existing agreements wi its lessees, none of whom is a party to the proceeding. I the order is permitted to stand, this contractual rel tionship would be terminated, and each lessee would that extent be deprived of the underground tank an

pump, which the Commission (at p. 28 of its brief), has characterized as the "store of the retail merchant," saying in that connection that the underground tank "is to the retail dealer in gasoline what shelves, counters and show-cases are to the retail dealer in tobacco, drugs or general merchandise."

Respondent is not insisting, and apparently the court below did not take the position, that respondent's lessees are necessary parties to these proceedings. However, certain contractual rights of respondent's lessees will be affected by the order of the Commission if it is permitted to stand, and possibly the Commission had this very situation in mind in making that provision of its order granting the respondent a period of four months within which to enter into new contracts or agreements with its lessees. In this connection respondent has in mind what this Court had to say on the subject of necessary parties in *United Shoe Machinery Corporation* v. *United States*, decided April 17, 1922.

In concluding this argument on the errors assigned by the Commission respondent respectfully directs attention to the fact that the findings and decision of the United States Circuit Court of Appeals for the Seventh Circuit in this respondent's case are in accord in practically all particulars with the following decisions in the Second, Third and Sixth Circuits involving a practice stated to be substantially identical with that of this respondent.

Standard Oil Company of N. Y. v. *Federal Trade Commission*, 273 Fed. 478.

Gulf Refining Co. v. *Federal Trade Commission*, 282 Fed. 81.

Canfield Oil Co. v. *Federal Trade Commission*, 274 Fed. 571.

LESSENED COMPETITION AND MONOPOLY.

The evidence shows that competition is increased and rendered more keen and active by the practice, and it is an effective instrument in preventing any monopoly in the sale of petroleum products. Many dealers would not be engaged in business if it were not for this practice.

This method serves a marketer as an entering wedge to any territory, and has proved an effective agency in the creation of competition in localities where none previously existed.

It is a matter of public record that at the time of this hearing the Commission had issued similar complaints against a great number of other marketing companies. The record in this case shows that the practice, to a greater or larger extent, is indulged in by practically all of the marketing companies. It could hardly be seriously contended that the practice of one company would tend to a monopoly when the same practice is followed almost universally by other companies in the same line of business. The facts developed furnished their own refutation of the charge.

The test for determining unfair methods of competition is not the gaining or losing of business or customers; yet the only objection made by the Commission to the practice is that certain competitors of respondent, who did not care to follow the practice, were unable to sell gasoline to dealers holding leased or loaned equipment. The fact that the practice causes some companies to make an investment which they would rather not be called upon to make, is no evidence of the lessening of competition. This same situation arises in every branch of trade, and is one that addresses itself to the business judgment of the company affected.

In all of the decided cases, where the stifling of competition or the tendency to create a monopoly has been condemned by the courts, such result was brought about by illegal acts or fraudulent business practices with a consequent injury to the public. No such situation is presented in the instant case, and the contention of the Commission cannot properly be sustained.

NOMINAL CONSIDERATION FOR THE LEASING OF EQUIPMENT AND RESTRICTED USE OF SAME.

The respondent is directed by the Order of the Commission to cease and desist from leasing equipment at a rental that will not return a reasonable profit on the cost of such equipment and from restricting the use of such equipment for the storing or handling of respondent's products. (Sinclair Record, p. 144.)

In that portion of the brief discussing the jurisdiction of the Commission, it has been shown that the Commission is not vested with authority to place either of these restrictions upon respondent in the leasing or loaning of this character of equipment, but it is deemed advisable at this point to supplement that argument and make some further observations upon the invalidity of the Order.

In the case of *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 312, it was announced that Congress did not intend to restrict an owner of property from selling it at any price acceptable to him or from giving it away, and the same rule applies to the leasing of property.

It is just as reasonable to say that the respondent must secure a direct and reasonable return upon the numerous other appliances necessary in the marketing of gasoline, as it is to say that it must secure such a return upon these

pumps and tanks. It is not possible for a company to secure returns in the way of profits upon every business activity. Large sums of money are expended by respondent and other industries in advertising their products. No direct return is or can be secured upon these expenditures, yet ultimate benefit in the way of profits to the company is expected, otherwise the expenditure would not be made. As previously stated, these pumps and tanks are in the nature of advertising devices, and considering the fact that the approximate cost of a piece of equipment is $300, simply as an advertising proposition the venture may be profitable. This investment at the rate of six per cent represents an interest charge of $18 per year. It is doubted if respondent's product could be more advantageously placed before the public in any other manner at so small an expense.

Previous portions of this brief have been devoted to showing that the restriction placed by respondent upon the holder of its equipment in the matter of storing or handling respondent's products is not an unlawful one, but is reasonable and necessary and works to the benefit of the public, the retail dealer and the marketer. The only complaint of injury is from those engaged in the same line of marketing as respondent, that is, those marketers who sell to the retail dealers. From the standpoint of a competitor, exactly the same business situation is presented if the respondent should appoint a dealer as its agent to sell its gasoline on commission and furnish such dealer the necessary equipment for conducting the agency. It is not and cannot be contended that such a method of vending an article would be in violation of any law, yet the competitor would not be in any better position to sell his products to such dealer than he now is. The same result may thus be obtained by two different methods of business. If the legality of one cannot be ques-

tioned there is no reason why the legality of the other should be.

"BAD MERCHANDISING."

There has been quoted in this brief extracts from the testimony of different witnesses to the effect that they regarded the practice as "bad merchandising." The Commission evidently confused what the witnesses defined as "bad merchandising" with unfair methods of competition. The testimony of these witnesses was simply to the effect that they did not approve of the practice from a business standpoint, and none of them offered any evidence to show that the practice was unfair as such a term is understood within the meaning of the Act. The evidence of these witnesses in a court of law is wholly incompetent to prove the issue; and, furthermore, has no possible bearing on the issue. In the hearing before a tribunal, such as the Commission, it is not possible and probably not advisable to confine the introduction of evidence to the established rules, but the evidence should be at least such as to enlighten the tribunal upon the issue presented.

These witnesses merely expressed their personal views as to whether the practice was good or bad merchandising—not from the standpoint of the public, but solely from the standpoint of profit to the marketers. Those witnesses who saw in it a fair profit and a means of expanding their business, approved of the practice. Those who did not regard it as profitable from a business standpoint or did not have the capital to indulge in the practice, disapproved it, asserting that they regarded it as a bad business policy.

The question whether the practice is bad merchandising is probably the "economic question" so stressed by the Commission; but neither the Commission nor the public

is properly interested in this phase of the controver
A business policy may be unprofitable to the one follo
ing it and may even injure competitors, but somethi
more is required to make it unfair from a competiti
standpoint.

INTERSTATE COMMERCE.

Respondent is not raising any question as to whether
is engaged in interstate commerce in the practice co
plained of in this proceeding.

THE SHERMAN ACT.

A number of cases are cited by the Commissi
throughout its brief construing the Sherman Act.
this Act is concededly not involved in the present case
is not deemed necessary to distinguish respondent's c
from those before the courts in the several cases cited
the Commission.

THE EXTENT OF THE PRACTICE.

The Commission takes the position that the princi
factors to be considered in a particular case are the s
of the organization making the leases or contracts,
territory covered, the number of dealers in a particu
locality, the number under exclusive contract with
lessor or selling company and the size and importance
such retail dealers. (pp. 34 and 35.)

Later in its brief (p. 36) it is stated by the Commiss
a company might institute a policy of entering into s
leases with the express intention of lessening competit
or monopolizing, but if the number of contracts whic
succeeded in securing was not sufficient to accomplish

desired purpose there would be no violation of the Clayton Act; but that on the other hand if such contracts were entered into in such number and under such conditions that the effect was to substantially lessen competition the purpose of the lessor, however innocent, would not avail to take the contracts out of the operation of the statute.

These positions of the Commission appear to be contradictory. In this connection respondent desires to call attention to the fact that the record discloses (Sinclair Record, p. 138) that respondent has in force 459 of its lease agreements, distributed throughout sixteen states, an average of approximately 28 to a state. Under the Commission's line of reasoning even the practical effect thereof would not be to lessen competition or tend to monopoly. This Court in the case of *United States* v. *United States Steel Corporation*, 251 U. S. 417, has said, "The law does not make mere size an offense or the existence of unexerted power an offense."

On page 40 of its brief the Commission states, "Doubtless in most such instances if equipment had not been loaned, dealers would nevertheless have entered the business and competition for their trade would have existed." We have heretofore shown (*Ante*, pp. 31-32) that "the average dealer in small towns and grocery stores and little garages could not furnish his own pump equipment and make a profit in handling gasoline as the investment would be too great. * * * In a number of cases pumps were put in and gasoline handled by dealers who could not afford to buy the pump equipment outright."

The Commission in its brief (pp. 37, 38 and 43) endeavors to show the percentage of dealers having contracts with the respondents in the cases under consideration (except Sinclair Refining Company) and in that connection states that they are dominant companies in the

territory in which they operate. But it fails to state that the smaller competing companies have under contract the remaining percentage of dealers.

EFFECTS OF RESPONDENT'S LEASING PRACTICE.

The following are some of the effects of respondent's leasing practice and those affected thereby:

A. *The Public:*

The record discloses that the price of gasoline is not increased by the practice; and that it conduces greatly to the convenience and safety of the public, and in the protection of the public in its purchases of the brands of gasoline favored by it. The public is in no wise injured. (*Ante*, p. 48.)

B. *The Lessees:*

No complaints or objections are shown on the part of lessees. The universality of the practice is indicative of the lessees' satisfaction with the same. They do not complain of any restriction of their activities.

C. *The Manufacturers:*

Pump and tank manufacturers have not voiced any complaint regarding respondent's practice. The record shows that there has been created for and carried to such manufacturers a remarkably large wholesale market, not enjoyed by them prior to the adoption of the practice.

D. *The Refiners and Marketers:*

The practice is almost universal among refiners and marketers. True, some of them regard the method as "bad merchandizing"; but that is far from saying it is an unfair method of competition, that it lessens competition, or that it tends to monopoly. Those objecting do so

on the ground that they dislike to incur the expense involved. This objection is characteristic of all branches of merchandising. There always have existed, and perhaps always will exist, merchants who, through financial inability or through lack of conviction of the wisdom of the course, hesitate to or are unwilling to adopt progressive marketing methods. It is not the intent or purpose of laws that financial conditions or business sagacity shall be equalized thereby.

As was well said by the court below:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various—superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said: 'Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise you may and must buy them.' In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different, nor unfair. If that is not true, then the law

> must mean that the Trade Commission is set as a watch on competitors, with the duty and the power to judge what is too fast a pace for some and to compel others to slow up. In other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practices from business in interstate commerce."

The financial objection is equally applicable to drive-in service stations. These are expensive of construction. In many localities the larger companies now dominate in this type of marketing facility, and the smaller companies have been unable to follow this lead. Their failure to do so may be prompted by doubt as to the wisdom of the method or be caused by the lack of sufficient funds. That this system of marketing is nevertheless lawful will hardly be questioned.

SUMMARY.

The Situation Under the Federal Trade Commission Act.

Reduced to its last analysis, the Commission's position seems to be:

That there is in this case no violation by respondent of Section 5 of the Federal Trade Commission Act unless (1) the condition of respondent's form of lease agreement monopolizes the business of lessees thereunder or lessens competition, (2) *by reason* of the fact that the equipment is leased for a nominal rental—(3) *and then only* in those cases where the lessees require only one tank and pump outfit.

If this be the situation in this case, then clearly it does not fall within the provisions of the Federal Trade Commission Act.

The Situation Under the Clayton Act.

In its brief (pp. 25-26) the Commission admits that in order to show, in respondent's case, a violation of Section 3 of the Clayton Act it is incumbent upon the Commission to establish (1) that respondent has made leases, (2) upon the condition that lessee shall not deal in the goods of a competitor or competitors, and (3) that the effect of such leases may be to substantially lessen competition or tend to create a monopoly.

The Commission concedes, as it must, that the condition in respondent's form of lease is not that "the lessee shall not deal in the goods of a competitor or competitors" of respondent. But, the Commission urges, under respondent's form of lease its lessees, if they require only a single pump and tank outfit, are *in effect*, if not actually, monopolized, and the *effect may be* to substantially lessen

competition; and that the third essential condition is thereby established, thus conclusively proving the second condition.

Respondent respectfully contends that the Commission has wholly failed to establish either the second or third of the propositions which it admits to be necessary to its success in this case under the Clayton Act. In seeking to establish at this stage of the proceedings the second of the above propositions (admitted by the Commission to be absolutely essential to its case), the Commission is asking this Court to find a condition which the Commission failed to find in its proceedings, and which the court below found is not shown by the record.

Admitting as it does that the condition in respondent's form of lease does not expressly go to the prohibited statutory extent of the Clayton Act, the Commission nevertheless insists that, even though respondent's lessees are free to install other equipment, by purchase or lease, they will not do so if the extent of their business does not warrant it; and that because such lessees do not acquire equipment other than respondent's, such lessees are monopolized and competition as to their business is lessened: not by anything that respondent has done or failed to do, not by reason of the conditions in respondent's lease agreements; but through the failure of such lessees to install equipment other than respondent's. In this roundabout and indirect way the Commission seeks to establish the third essential proposition above set forth.

It is respondent's view that this mere possibility of the lessening of competition or the creating of monopoly is too remote to be regarded as having substantial effect or as having monopolistic tendency.

Respondent submits that for the several reasons set forth in this brief, by virtue of the express admissions of the Commission in its brief contained, and the al-

sence of support in the record and under the authorities for such points as the Commission continues to urge, the judgment and decree of the United States Circuit Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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February 24, 1923.